Appellate Court Decisions
Involving Washington's Growth Management Act
1999-2007

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Contents

INTRODUCTION

Washington's Growth Management Act (GMA) was adopted by the Legislature in 1990 and 1991. By 1993, the first published appellate decision referencing the GMA appeared.[1] Over the next two years, other decisions cited to the GMA or discussed it without significant interpretation of the Act.[2] The first published appellate decision squarely interpreting a provision of the GMA was issued in 1995.[3] In 1998 the Washington Supreme Court issued its first substantive interpretation of the GMA.[4] By mid-1999, there had been enough appellate decisions issued on the GMA to warrant a law review article discussing the rulings to date.[5] In that article, Professor Richard Settle wrote:

> The courts generally have embraced the purposes, goals, and central principles of the Act. Apparent judicial concern than uninformed, disgruntled citizens might undermine the legislature's statewide growth management goals has led the courts to deny the availability of referenda and initiatives to override GMA implementation decisions of local governing bodies. Facial constitutional challenges of core GMA requirements have been quite summarily rejected. . . . In dicta, the courts routinely recite the legislative findings supporting GMA's central purposes to concentrate growth in UGAs while protecting environmentally critical areas, natural resource industries, and efficient public facilities and services from the consequences of sprawl.
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> The courts seem to recognize that, unlike SEPA and SMA, GMA was spawned by controversy, not consensus. . . . Thus, broad interpretation of GMA requirements and deference to Growth Board decisions have not necessarily occurred. The courts have analyzed each issue in light of statutory language and legislative history to determine whether the legislature intended to impose an asserted requirement on local government, and, in cases of broad or ambiguous GMA requirements, whether the legislature intended local governments or the Growth Boards to "fill in the blanks."[6]

Professor Settle's observation provides a good starting point for reviewing the appellate decisions issued since 1999. With only a few exceptions, the decisions have remained within the legislative framework established in the GMA. The appellate courts have continued to embrace the purposes, goals, and central principles of the GMA, and they have continued to examine the specific requirements of the GMA in light of those purposes, goals, and principles. They have recognized the internal tension and conflicts among the GMA goals and have begun to address the conflicts that sometimes arise between the specific

[1] *King Cy. v. Wash. State Boundary Rev. Bd. for King Cy.*, 122 Wn.2d 648, 860 P.2d 1024 (Nov. 4, 1993).

[2] In chronological order, *see Snohomish Cy. v. Anderson*, 123 Wn. 2d 151, 868 P.2d 116 (Jan. 27, 1994); *Jones v. King Cy.*, 74 Wn. App. 467, 874 P.2d 853 (Apr. 18, 1994); *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 876, 872 P.2d 1090 (May 19, 1994); *Save Our State Park v. Bd. of Clallam Cy. Comm'rs*, 74 Wn. App. 637, 875 P.2d 673 (June 24, 1994); *Snohomish Cy. Prop. Rights Alliance v. Snohomish Cy.*, 76 Wn. App. 44, 882 P.2d 807 (Sept. 19, 1994), *review denied*, 125 Wn.2d 1025 (Feb. 9, 1995); *Snohomish Cy. v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (Oct. 6, 1994); *Whatcom Cy. v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (Dec. 8, 1994); *Vashon Island Comm. for Self-Gov't. v. Wash. State Boundary Rev. Bd. for King Cy.*, 127 Wn.2d 759, 903 P.2d 953 (Oct. 12, 1995).

[3] *Matson v. Clark Cy. Bd. of Comm'rs*, 79 Wn. App. 641, 904 P.2d 317 (Nov. 1, 1995).

[4] *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 958 P.2d 962 (June 25, 1998).

[5] Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle Univ. L. Rev. 5 (1999).

[6] Settle, 23 Seattle Univ. L. Rev. at 31-34 (footnotes omitted).

requirements of the GMA and the goals of the GMA. The courts have reconciled the discretion granted local governments under the GMA with the deference given to decisions of the Growth Management Hearings Boards. They have continued to interpret the Boards' jurisdiction narrowly.

Professor Settle's article summarized the significant appellate court decisions involving the GMA issued through June 1999.[7] This article picks up where Professor Settle left off, providing brief summaries of significant appellate court decisions involving the GMA issued since June 1999. The summaries are not intended to include every issue discussed by the court in a particular case, but rather are meant to highlight the portions of the decisions that appear to have set important precedent, that have interpreted specific provisions of the GMA, or that likely will have importance in the future for understanding and interpreting the GMA.

[7] Professor Settle's article discussed the following cases (in chronological order):

1993: *King Cy. v. Wash. State Boundary Rev. Bd. for King Cy.*, 122 Wn.2d 648, 860 P.2d 1024 (Nov. 4, 1993).

1994: *Snohomish Cy. v. Anderson*, 123 Wn. 2d 151, 868 P.2d 116 (Jan. 27, 1994); *Jones v. King Cy.*, 74 Wn. App. 467, 874 P.2d 853 (Apr. 18, 1994); *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 876, 872 P.2d 1090 (May 19, 1994); *Save Our State Park v. Bd. of Clallam Cy. Comm'rs*, 74 Wn. App. 637, 875 P.2d 673 (June 24, 1994); *Snohomish Cy. Prop. Rights Alliance v. Snohomish Cy.*, 76 Wn. App. 44, 882 P.2d 807 (Sept. 19, 1994), *review denied*, 125 Wn.2d 1025 (Feb. 9, 1995); *Snohomish Cy. v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (Oct. 6, 1994); *Whatcom Cy. v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (Dec. 8, 1994).

1995: *Vashon Island Comm. for Self-Gov't. v. Wash. State Boundary Rev. Bd. for King Cy.*, 127 Wn.2d 759, 903 P.2d 953 (Oct. 12, 1995); *Matson v. Clark Cy. Bd. of Comm'rs*, 79 Wn. App. 641, 904 P.2d 317 (Nov. 1, 1995).

1996: *Postema v. Snohomish Cy.*, 83 Wn. App. 574, 922 P.2d 176 (Sept. 9, 1996), *review denied*, 131 Wn.2d 1019 (Apr. 4, 1997).

1997: *Washington State Dep't of Corrections v. City of Kennewick*, 86 Wn. App. 521, 937 P.2d 1119 (May 22, 1997) (amended June 26, 1997), *review denied*, 134 Wn.2d 1002 (Feb. 3, 1998); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (Dec. 18, 1997).

1998: *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 91 Wn. App. 1, 25-26, 951 P.2d 1151, 1164 (Mar. 2, 1998), *aff'd in part, rev'd in part*, 138 Wn.2d 161, 979 P.2d 374 (June 10, 1999) (amended Sept. 22, 1999); *City of Bellevue v. E. Bellevue Cmty. Coun.*, 91 Wn. App. 461, 957 P.2d 267 (June 8, 1998), *reversed*, 138 Wn.2d 937, 983 P.2d 602 (Sept. 9, 1999); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 958 P.2d 962 (June 25, 1998); *Manke Lumber C., Inc. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (July 31, 1998), *review denied*, 137 Wn.2d 1018 (Mar. 2, 1999); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (Aug. 6, 1998); *Project for Informed Citizens v. Columbia Cy.*, 92 Wn. App. 290, 966 P.2d 338 (Sept. 4, 1998); *review denied*, 137 Wn.2d 1020 (Apr. 6, 1999); *Litowitz v. City of Federal Way*, 93 Wn. App. 66, 966 P.2d 422 (Nov. 9, 1998); *Torrance v. King Cy.*, 136 Wn.2d 783, 966 P.2d 891 (Nov. 12, 1998).

1999: *Glenrose Cmty. Ass'n v. City of Spokane*, 93 Wn. App. 839, 971 P.2d 82 (Feb. 4, 1999), *review denied*, 138 Wn.2d 1009 (Aug. 31, 1999); *Diehl v. Mason Cy.*, 94 Wn. App. 645, 972 P.2d 543 (Mar. 5, 1999); *Clark Cy. Natural Res. Coun. v. Clark Cy. Citizens United, Inc.*, 94 Wn. App. 670, 972 P.2d 941 (Mar. 12, 1999); *Association of Rural Residents v. Kitsap Cy.*, 95 Wn. App. 383, 974 P.2d 863 (Mar. 29, 1999); *aff'd in part, reversed in part*, 141 Wn.2d 185, 4 P.3d 115 (July 20, 2000); *Honesty in Envtl. Analysis & Legis. (HEAL) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 96 Wn. App. 522, 979 P.2d 864 (June 21, 1999) (amended Aug. 25, 1999).

APPELLATE DECISIONS IN JUNE-DECEMBER 1999

King County v. Central Puget Sound Growth Management Hearings Board, 138 Wn.2d 161, 979 P.2d 374 (June 10, 1999) (amended Sept. 22, 1999).

Factual and Procedural Background

In 1991, King County adopted a county-wide planning policy (CPP) under RCW 36.70A.210 that designated two vested Urban Planned Developments (UPDs) in the rural Bear Creek area as part of an urban growth area (UGA). To achieve consistency with the CPP, King County's comprehensive plan, adopted in 1994, designated the Bear Creek UGA, which included the two UPDs..

Two citizens groups challenged the County's decision. The Central Board issued a Final Decision and Order (FDO), holding that inclusion of the UPDs in the Bear Creek UGA was required by the CPP.

The Board subsequently granted the citizens' motion for reconsideration and reversed its FDO, holding (1) the CPPs were internally inconsistent, ambiguous, and not directive of the County's exercise of discretion in adopting its final UGA; and (2) the County had not adequately justified inclusion of the UPDs. The Board remanded with instructions to (1) delete the UPDs from the UGA, (2) make the UPDs a fully contained community if they met the requirements of RCW 36.70A.350, or (3) adequately justify their inclusion in the UGA under RCW 36.70A.110.

The County designated the UPDs as a fully contained community, but also filed one of three petitions for review in Superior Court followed. The three petitions were consolidated by the Superior Court, which reversed the Board in part, ruling the CPPs directed that the UPDs be designated a UGA in the comprehensive plan. The Court also dismissed as moot a challenge to a May 1996 compliance order.

The Court of Appeals affirmed the Superior Court.

The Court's Decision

The Supreme Court affirmed in part and reversed in part.

CPPs may be directive. The Supreme Court agreed CPPs may be directive:

> The CPPs are thus the major tool provided in the GMA to ensure that the comprehensive plans of each city within a county agree with each other. If the CPPs served merely as a nonbinding guide, municipalities would be at liberty to reject CPP provisions and the CPPs could not ensure consistency between local comprehensive plans.[8]

Comprehensive plan provisions may be challenged even if the provisions are mandated by CPPs. Under RCW 36.70A.210(6), only cities or the Governor may appeal a CPP. The Board had concluded the Bear Creek UGA was immunized from challenge because it was directed by a CPP. The Court disagreed, reasoning that such immunity conflicts with two GMA provisions: (1) RCW 36.70A.140, which requires that counties provide for early and continue public participation in the development and amendment of comprehensive plans; and (2) the liberal right of appeal granted in RCW 36.70A.280(2)-(3). The Court also concluded that shielding such provisions from challenge undermines the schedule for UGA adoption in RCW 36.70A.110(5) by effectively allowing UGAs to be adopted at the time the CPPs are formulated.

The Court also explained that a UGA designation that "blatantly violates" GMA requirements should not stand simply because CPPs mandated its adoption; rather "it should be stricken from both the comprehensive plan and the CPPs."[9]

The Court reinstated the Board's Order on Reconsideration and held the citizens groups' challenge to the compliance order was not moot.

[8] 138 Wn.2d at 175.

[9] *Id.* at 176.

The Court remanded to the Board to determine whether King County's redesignation of the Bear Creek UGA as a fully contained community complied with the GMA.

A comprehensive plan provision found not to comply with the GMA remains in effect unless the Board also enters a determination of invalidity. The Board found the Bear Creek UGA noncompliant with the GMA but did not enter a determination of invalidity. Under RCW 36.70A.302, absent an order of invalidity, the UGA remained valid during remand.

For proceedings after remand, *see Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.* 119 Wn. App. 562, 81 P.3d 918 (2003) (below at page 45).

Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board, 96 Wn. App. 522, 979 P.2d 864 (June 21, 1999) (amended Aug. 25, 1999).

Factual and Procedural Background

In 1995, the City of Seattle amended its critical areas regulations and policies upon which the regulations are based. HEAL challenged amendments addressing development on steep slopes, arguing the City had not included the best available science as required under RCW 36.70A.172(1). The Central Board held its review was limited to whether the City included the best available science during the development of the amendment, not whether the amendment was supported by the science in the record. The Board specifically rejected HEAL's argument that the City must rely on scientific information supplied to it, rather than scientific information it developed. The Board held the City properly included the best available science in amending its steep slope regulations, but concluded it had no jurisdiction to review the City's critical areas policies.

HEAL appealed to Superior Court, which reversed.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.

Growth Management Hearings Boards may review critical areas policies for compliance with the best available science requirement. The Court acknowledged that the GMA does not require local governments to adopt critical areas policies, but held that if a city or county chooses to adopt critical areas policies, the Board has jurisdiction under RCW 36.70A.280 to review the policies to determine whether they comply with RCW 36.70A.170 and .172(1).[10]

Local governments must give substantial consideration to the best available science when developing critical area policies and regulations. The Court rejected the argument that the best available science requirement is purely procedural, requiring only that the science be included in the record. The Court also rejected the contention that a critical area policy or regulation must precisely mirror the best available science in the record. The Court instead took a middle approach, holding that local governments must give substantive consideration to the best available science.

The best available science requirement is intended to ensure that critical areas regulations are not based on "speculation and surmise." Borrowing from a federal case analyzing an analogous requirement in federal law, the Court of Appeals described the best available science requirement as intended "to ensure that regulations not be based on speculation and surmise."[11]

Compliance with the best available science requirement may be necessary to satisfy constitutional nexus and proportionality requirements. The Court suggested in dictum that the best available science requirement may have constitutional ramifications:

[10] 96 Wn. App. at 528. The court inadvertently referred to RCW 36.70A.171 (which does not exist), rather than RCW 36.70A.170.

[11] *Id.* at 531.

> [T]he policies and regulations adopted under the GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications. If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited.
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> . . . The science the legislative body relies on must in fact be the best available to support its policy decisions. . . . [I]t cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does so, that decision will violate either the nexus or rough proportionality rules or both.[12]

Nolte v. City of Olympia, 96 Wn. App. 944, 982 P.2d 659 (Aug. 20, 1999).

This decision did not interpret the GMA, but it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

Before adopting a comprehensive plan under the GMA, the City of Olympia and Thurston County agreed to plan jointly for the UGA adjacent to the City's municipal boundary. The agreement was reflected in their comprehensive plan, which provided that the City would fund roads and neighborhood parks in the unincorporated UGA and the County would collect impact fees from new development in UGA to defray the costs of providing those services. The City and County also adopted parallel sewer and water ordinances providing that as a condition of connection to property in the UGA, an applicant must: (1) either annex to the City or execute a utility extension agreement (UEA); and (2) pay an impact fee for parks, fire protection facilities, and schools.

A developer submitted a proposed plat for a planned residential development in the unincorporated UGA and entered into a UEA with the City, in which the City agreed to provide water and sewer connections and the developer agreed to future annexation and to pay the impact fees referenced above.[13] The developer then filed an action in Superior Court alleging the City could not lawfully impose impact fees and asking the Court to order the City to provide water and sewer service without charging impact fees.

The Superior Court held the City lacked statutory authority to impose impact fees outside its municipal boundary and could not do so, and struck the impact fee provisions from the UEA, but it held the remainder of the UEA was mutually enforceable and valid. The City appealed.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.

The City was not statutorily authorized to impose impact fees on development outside its municipal boundary. The Court rejected the City's argument that the impact fees were imposed either by the County or by the City and County jointly. The Court held they were City impact fees and that the City had no statutory authority to impose the impact fees.

RCW 36.70B.170 authorizes the City to enter into a development agreement outside its boundary as part of a proposed annexation or a service agreement, which may include "impact fees imposed or agreed to in accordance with any applicable provisions of state law." The Court held this authority is limited by RCW 36.70B.210, which provides that RCW 36.70B.170 grants no authority to impose impact

[12] *Id.* at 533-34.

[13] The use of utility extension agreements in this type of situation was at issue in *Grant Cy. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (Mar. 14, 2002), *vacated in part*, 150 Wn.2d 791, 83 P.3d 419 (Jan. 29, 2004). *See* page 38, below.

fees; rather, impact fees must be "expressly authorized by other applicable provisions of state law."

The Court found no other provision of state law authorizing the City to impose impact fees outside its municipal boundary. The Court read RCW 82.02.050 through .090 and RCW 58.17.110 as authorizing impact fees only within the municipal boundary. The Court, relying on RCW 82.02.020, also rejected the City's argument that it could impose impact fees outside its municipal boundary in its role as a utility provider.

Because an "essential part" of the UEA was stricken, the City was not obligated under the UEA. Relying on basic contracts law, the Court held the impact fees provision was an "essential part" of the contract, such that the City would not have entered into the UEA absent inclusion of that provision. The Court held the UEA could not be enforced against the City.

As the sole provider of water and sewer service in the UGA, the City had a public duty to provide the service. The Court held the City has a public duty to serve all land within the UGA, since it is the exclusive provider of water and sewer service to the UGA. Although the City was not bound by the particular contractual duty in the UEA signed by the developer here, the City "must perform its public duty in the manner provided by law."[14]

Duwamish Valley Neighborhood Preservation Coalition v. Central Puget Sound Growth Management Hearings Board, 97 Wn. App. 98, 982 P.2d 668 (Aug. 23, 1999).

Factual and Procedural Background

A neighborhood coalition challenged amendments to King County's comprehensive plan and development regulations, alleging the County did not comply with the GMA's public participation requirements. The Central Board denied the coalition's motion to supplement the record and held the coalition lacked standing to raise an issue regarding the County's SEPA compliance. The Superior Court affirmed.

The Court's Decision

The Court of Appeals reversed, holding the Board should have allowed the coalition to supplement the record. In an unpublished part of the decision, the Court explained that the Board had authority to grant the motion to supplement and its refusal to admit that evidence, without explaining its reasons for its decision, was error.

Growth Management Hearings Boards are not liable for attorney's fees under Washington's Equal Access to Justice Act when they decide GMA petitions. The Court rejected the coalition's request for attorney's fees against the Board, holding that the Equal Access to Justice Act, RCW 4.84, does not apply to a decision of a purely adjudicative body such as the Board:

> The County, not the Board, is the Coalition's adversary. The Board was acting as an adjudicative body, and is but a nominal party in the judicial proceedings. To award fees against it would be akin to awarding fees against the trial court when an appellate court reverses its decision, and would be inappropriate.[15]

City of Bellevue v. East Bellevue Community Council, 138 Wn.2d 937, 983 P.2d 602 (Sept. 9, 1999).

This decision did not interpret the GMA, but it involved issues that bear on some local governments' implementation of the GMA.

Factual and Procedural Background

Before the GMA was enacted, the City of Bellevue used an "open zone" zoning designation to protect environmentally sensitive areas. Between 1989 and 1993, the City eliminated the designation as it revised its

[14] 96 Wn. App. at 959.

[15] 97 Wn. App. at 101.

comprehensive plan, creating instead more specific land use designations, some of which allowed residential development at a range of possible densities.

The East Bellevue Community Council had authority under RCW 35.14.040 to approve or disapprove comprehensive plan amendments and rezone ordinances affecting land within its jurisdiction. The Council approved the plan amendments, but disapproved several implementing rezones as inconsistent with the City's comprehensive plan policies regarding traffic congestion and environmentally sensitive areas.

The City sued. The Superior Court ruled the Council did not have authority under RCW 35.14.040 to disapprove the rezone ordinance because the designations in the rezones were consistent with the land use designations in the comprehensive plan amendments previously approved by the Council. The Court of Appeals affirmed at 91 Wn. App. 461, 957 P.2d 267.

The Court's Decision

The Supreme Court reversed.

Community Councils exercising their discretion under RCW 35.14.040 must comply with the GMA. The Court held RCW 35.14.040 authorized the Council to determine, independent of the City, whether to approve or disapprove land use legislation affecting territory within the Council's jurisdiction. The Court rejected the contention that the Council already had exercised its discretion by approving the comprehensive plan amendments. Because the Council had independent discretion under RCW 35.14.040 and was not just a reviewing body, the Court held it was not necessary for the City's decision to have been wrong in some respect before the Council could disagree with it.

The City argued that the GMA barred the Council's action because that action put the City's zoning out of compliance with its amended comprehensive plan. The Court disagreed, noting both that the Council could not disregard applicable provisions of the GMA and that the City could rezone in conformity with the comprehensive plan.

Buckles v. King County, 191 F.3d 1127 (Sept. 10, 1999).

Factual and Procedural Background

The day before King County adopted its comprehensive plan, it responded to lobbying by Buckles to designate their property for limited retail and commercial use, even though it was surrounded by residential development. After the comprehensive plan was challenged and found to be noncompliant with the GMA, the county redesignated Buckles' land to its prior residential designation and zoning, which was consistent with the surrounding residential zoning. Buckles were not parties to the GMA challenge and did not receive notice of the proceedings before the Central Board.

Rather than appealing the Board's decision, Buckles filed suit in Superior Court against King County and the members of the Central Board, claiming constitutional violations and damages under 42 U.S.C. § 1983. The County removed the case to federal court. The federal District Court dismissed the claims against the Board members and granted summary judgment for the County on the constitutional claims.

The Court's Decision

The Ninth Circuit held the ***Growth Management Hearings Board members acting in their quasi-judicial role have absolute immunity from suit.*** The Court also affirmed summary judgment for the County on the constitutional claims.

City of Des Moines v. Puget Sound Regional Council, 97 Wn. App. 920, 988 P.2d 993 (Nov. 15, 1999), *review denied*, 140 Wn.2d 1022 (June 6, 2000) (*Des Moines I*).

Factual and Procedural Background

In 1996, the Puget Sound Regional Council (PSRC) amended the Regional Transportation Plan (RTP) for central Puget Sound to include planning for a third runway at Seattle-Tacoma

International Airport. Adjacent cities and others challenged the decision to amend the RTP, alleging violations of the GMA and SEPA.

The Superior Court dismissed the challenges. The cities appealed a single issue: whether the GMA requires RTPs to comply with previously adopted local comprehensive plans.

The Court's Decision

The Court of Appeals affirmed, holding that local comprehensive plans cannot trump regional actions.

Regional transportation plans are planning documents, and are not required to impose specific mitigation measures on development. The Court rejected the argument that RTPs must impose site-specific mitigation measures to address impacts on surrounding cities, consistent with those cities' comprehensive plans. The PSRC is a planning agency, not a permitting agency, and the RTPs are planning documents, not permitting decisions. While the PSRC has authority to impose mitigating conditions during the planning stage, it has no duty to do so. The Court, referencing the "federal, state, regional, county, and local regulations and conditions that will be placed on the construction,"[16] rejected the cities' prediction that mitigation would never be undertaken if not imposed in the RTPs.

Regional transportation plans, if created through the cooperative process provided for in the GMA, prevail over inconsistent local comprehensive plans. The Court found RCW 47.80.023[17] requires consistency from both regional and local plans without specifying which prevails. Calling that a "gap in the statutory scheme,"[18] the Court examined RCW 36.70A and RCW 47.80 as a whole to determine the intent of the Legislature and held the GMA does not require regional plans to conform to local comprehensive plans:

> Although the Legislature did not explicitly direct that regional plans should prevail over local plans if the two conflict, when construed as a whole, the GMA evinces the Legislature's intent to discard the traditional land use system in which each jurisdiction functioned as an isolated entity in favor of a scheme which stresses coordination, cooperation, and integration. In light of this legislative purpose, we agree with the PSRC that if the coordinated planning process does not result in consistency between regional and local plans, the regional plans must prevail.[19]

The Court stressed, however, that regional planners may not "steamroll" local comprehensive plans in favor of regional goals:

> The purposes of the GMA are met only if city, county, and regional planners cooperate and coordinate. When this process occurs, as it did here, the regional plan should reflect choices and goals endorsed by the majority of the cities and towns within the region. To require unanimity among these jurisdictions or to invalidate a regional plan that does not reflect every aspect of

[16] 97 Wn. App. at 928.

[17] The Court treated RCW 47.80.023 as part of the GMA. "Although the bulk of the GMA is codified in RCW 36.70A, RCW 47.80 contains the transportation elements of the Act. The Legislature adopted both chapters as part of a single legislative bill." 97 Wn. App. at 922 n.2.

[18] *Id.* at 931.

[19] *Id.* at 929.

every city plan within the region would defeat the clear purposes of the GMA.[20]

City of Des Moines v. Puget Sound Regional Council, 98 Wn. App. 23, 988 P.2d 27 (Nov. 15, 1999), *review denied*, 140 Wn.2d 1027 (June 6, 2000) (*Des Moines II*).

Factual and Procedural Background

The Port of Seattle challenged the City of Des Moines' comprehensive plan, alleging it precluded expansion of the Seattle-Tacoma International Airport, an essential public facility, in violation of RCW 36.70A.200(2). The Port also argued the City's plan was inconsistent with the Regional Transportation Plan (RTP), King County's comprehensive plan, and the multi-county planning policies. The Central Board found the entire Des Moines comprehensive plan violated RCW 36.70A.200, and it invalidated two policies it found in conflict with the RTP and the GMA's transportation goal, RCW 36.70A.020(3).

On remand, the City amended only the two invalidated policies. The Board held the City's plan still did not comply with the GMA, reinstated its invalidity order, and recommended that the Governor impose sanctions if the City did not bring its plan into compliance. The City then amended its plan and the Board found it compliant.

The Court's Decision

The Court of Appeals affirmed the Board.

A port district has a duty to comply with a local comprehensive plan that is consistent with the regional transportation plan. Referring to its analysis in *Des Moines I*, the Court held the Port was not required to comply with the City's comprehensive plan unless the City had engaged in the cooperative planning process required by the GMA and produced a plan reflecting that coordinated approach:

> [I]f a conflict between a city plan and an RTP exists after the planning process is completed, the city must revise its plan to comply with the regional plan. After consistency is achieved, the Port will have a duty to comply with both the RTP and the local plans, regardless of whether they require mitigation which the Port finds either difficult or expensive.[21]

Local governments may not preclude the expansion of an essential public facility. The cities argued that RCW 36.70A.200(2), which prevents local governments from precluding the siting of essential public facilities, does not apply to the expansion of existing essential public facilities. The Court rejected the argument, relying in part on CTED's procedural criteria and deferring to the Board's interpretation that the requirements of RCW 36.70A.200(2) apply to all essential public facilities, whether or not they were in existence prior to the GMA.

Local governments may not preclude off-site support activities necessary to the construction, expansion, or operation of an essential public facility. The cities also argued that RCW 36.70A.200(2) does not apply to necessary support activities that occur off-site. The Court rejected this argument as well, again relying on CTED's procedural criteria, including language in WAC 365-195-340(2)(c) that no comprehensive plan may "directly or indirectly" preclude the siting of an essential public facility. The Court held the legislative purpose of RCW 36.70A.200(2) would be defeated if local governments could prevent the construction or operation of an essential public facility: "if an activity is indeed 'essential' to construction of an EPF, a local plan may not stop it from occurring."[22] The Court found the Port had demonstrated the supporting activities at issue were necessary for airport expansion to occur.

[20] *Id.* at 934-35.

[21] 98 Wn. App. at 31.

[22] *Id.* at 34.

The GMA's prohibition on "precluding" the siting or expansion of essential public facilities does not prevent local governments from imposing reasonable permitting and mitigation requirements. The Court upheld the Board's definition of "preclude" in RCW 36.70A.200, as "incapable of being accomplished by the means at the Port's command." The fact that reasonable permitting and mitigation requirements would make construction more expensive did not preclude construction and did not relieve the Port of its obligation to comply with comprehensive plans that are consistent with the RTP.

New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 989 P.2d 569 (Dec. 10, 1999), *review denied*, 140 Wn.2d 1019 (May 3, 2000).

This decision did not interpret the GMA, but it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

A developer applied for preliminary plat approval two days before the City adopted its transportation impact fee (TIF) ordinance. The City Council reversed the hearing examiner's decision that the TIF ordinance did not apply to the proposed development, and the developer appealed. The Superior Court reversed.

The Court's Decision

The Court of Appeals reversed the Superior Court.

Washington's subdivision vesting statute does not apply to transportation impact fees imposed under RCW 82.02. RCW 58.17.033 provides that a proposed subdivision of land vests to the land use control ordinances in effect at the time a fully completed application for preliminary plat approval of the subdivision has been submitted to the appropriate official. At issue was whether TIFs are "land use control ordinances." The Court of Appeals held they are not.

The Court characterized the dispute as one involving the timing of the fee's calculation:

> The Cities assert the calculation should be made when the building permit is issued; the Developers want it to occur at the time of the application. The Cities assert that TIFs are not land use control ordinances because the Legislature never intended the vesting statute to apply to TIFs and because, as a tax, TIFs do not fall within the definition of land use control ordinance. The Developers contend that TIFs are land use ordinances and are not taxes.[23]

Complicating the issue was the fact that TIFs were authorized by the GMA, which regulates land use, and TIFs apply only to land use.[24]

The Court held a TIF is not the type of right that vests under Washington's vested rights doctrine: a TIF does not limit use of land or resemble a zoning law, but only affects the ultimate cost of development. A TIF is a fee charged to new development, the purpose of which is to finance public facilities and system improvements, not to regulate development.

The Court held it would be contrary to public policy to apply the vesting statute to TIFs:

> [T]o apply the vesting statute to TIFs would thwart the Legislature's intent that TIFs be "reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development." RCW 82.02.090(3). These are perhaps the reasons the Legislature required TIFs to be tied to the local growth management plan, which evolves over time. RCW

[23] 98 Wn. App. at 228.

[24] The Court of Appeals found it significant that authority for TIFs, adopted as part of the GMA in 1990, was not placed in the RCW chapters governing land use control or development regulation, but instead was codified among excise taxes in Title 82 RCW. *Id.* at 235-36.

82.02.050(4). The time lag between the application for preliminary plat approval and the issuance of the permit application may be many years. Thus, the fee calculated by LaCenter at the time of preliminary plat approval would bear little relationship to the actual impact of growth at the time the permit is issued.

. . . To freeze the calculation of the impact fee at the time of application would disconnect planning and financing from the actual effects of growth. The Legislature has stated that the indirect effects of growth can be recovered. If the fee were frozen, then new growth could take place without the developer paying its fair share for improving public facilities. The developer could be paying an impact fee that reflects a planning effort and a cost that is no longer relevant. The TIFs must be calculated when the growth is to occur, at the time of the building permits; otherwise cities would be underfunded to pay for the indirect costs of new growth.[25]

APPELLATE DECISIONS IN 2000

Caswell v. Pierce County, 99 Wn. App. 194, 992 P.2d 534 (Jan. 31, 2000), *review denied*, 142 Wn.2d 1010 (Dec. 5, 2000).

This decision did not interpret the GMA, but it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

The owner of a mobile home park in rural Pierce County applied for a conditional use permit to expand. At the time of the application, the proposed development was allowed under the County's zoning ordinance, but lay outside a designated interim urban growth area (IUGA). The hearing examiner approved the conditional use permit, concluding the zoning ordinance took precedence over the County's interim growth management policies, including the IUGA ordinance.

Adjacent property owners appealed to Superior Court, which reversed, holding the hearing examiner failed to consider that the proposed development was contrary to Pierce County's IUGA ordinance and the GMA.

The Court's Decision

The Court of Appeals reversed and remanded for reinstatement of the hearing examiner's decision.

A challenge to an IUGA ordinance may not be brought under the Land Use Petition Act but must be taken to a Growth Management Hearings Board. The adjacent property owners brought their appeal under the Land Use Petition Act (LUPA), RCW 36.70C. The Court held the County's IUGA ordinance could not be challenged in a LUPA appeal, because LUPA, by its own terms, does not apply to decisions subject to review by a Growth Management Hearings Board.

The Court then examined the IUGA ordinance and concluded the County had intended to leave the rural zoning in effect during the interim period as part of its IUGA ordinance. The Court found the proposed development complied with the rural zoning.

The Dissent

One judge dissented, arguing that the adjacent property owners' LUPA challenge was appropriate because they were challenging a permit, not the ordinances themselves. Pointing out that an IUGA designation is itself a development regulation, he also argued the IUGA ordinance should be viewed as an additional limitation supplementing the rural zoning restrictions.

[25] *Id.* at 236-37 (footnote omitted).

Stewart v. Washington State Boundary Review Board, 100 Wn. App. 165, 996 P.2d 1087 (Feb. 28, 2000).

This decision did not interpret the GMA, but it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

Property owners petitioned the City of Auburn to annex their property, which lay within an urban growth area and an agricultural production district—i.e., it was designated as agricultural land of long-term commercial significance under RCW 36.70A.170. The City approved the annexation. The BRB denied the annexation as premature because King County and the City had not entered into an interlocal agreement, as required under the county-wide planning policies and the County's comprehensive plan. The Superior Court affirmed the BRB

The Court's Decision

The Court of Appeals affirmed.

Boundary review boards are obligated to comply with the GMA and comprehensive plans adopted under the GMA; they may not reject a determination made in a final comprehensive plan. The Court rejected the property owners' argument that the BRB erred by accepting the County's designation of their property as agricultural. The Court held the BRB is not empowered to decide that issue:

> Boundary review boards may not make land use decisions. Their powers . . . do not include rejection of a designation contained in a final county comprehensive plan. Instead, one statutory objective of boundary review boards is the protection of land designated agricultural in a comprehensive plan. Boundary review boards are also required by RCW 36.93.157 to make decisions consistent with specified sections of the GMA. The authority to review compliance with the GMA, on the other hand, is vested in the growth management hearings board (GMHB).
>
> . . . To ignore the comprehensive plan designation [as the property owners requested] would conflict with the BRB's statutory duties to make decision consistent with the purposes of the GMA and to protect designated agricultural land. To redesignate the land would exceed the BRB's powers. The BRB correctly declined to consider the question.[26]

The Court of Appeals refused the property owners' invitation to invalidate King County's interlocal agreement requirement, in large part because to do so would "avoid presentation of their arguments to the entity created by the legislature to decide them."[27] Rather, the arguments should be made first to the agency with expertise: the Growth Management Hearings Board.

Wells v. Western Washington Growth Management Hearings Board, 100 Wn. App. 657, 997 P.2d 405 (Apr. 10, 2000).

Factual and Procedural Background

As a result of a series of challenges before the Western Board, Whatcom County found itself subject to several determinations of noncompliance and invalidity regarding interim ordinances adopted to comply with the GMA. Rather than continue to revise its interim ordinances, the County adopted its comprehensive plan and implementing development regulations. The Board found significant portions of the plan and regulations noncompliant and invalid.

The Superior Court held the Board misinterpreted the GMA's "participation standing" provision, RCW 36.70A.280(2)(b), and failed to apply the presumption of validity to

[26] 100 Wn. App. at 169-70.

[27] *Id.* at 177.

the County's comprehensive plan and development regulations.[28]

The Court's Decision

The Court of Appeals affirmed the Board.

A Growth Management Hearings Board may determine that portions of a new comprehensive plan and implementing development regulations were adopted in response to a prior determination of invalidity. The local government has the burden of demonstrating those portions do not substantially interfere with the fulfillment of the goals of the GMA. The Court rejected the County's argument that a newly adopted comprehensive plan could never be considered responsive to the prior determinations of invalidity and thus must always be presumed valid in its entirety under RCW 36.70A.320(1). Rather, the Court held the Board may properly find that a local government adopted portions of its comprehensive plan and development regulations in response to an earlier determination of invalidity. Under RCW 36.70A.320(4), the burden then shifts to the local government as to those portions of the plan and regulations. All other portions of the plan and regulations are presumed valid and the burden is on the challengers to demonstrate invalidity under RCW 36.70A.320(2). The challengers always have the burden of proving noncompliance.

A petitioner's participation before the local government need only have been "reasonably related" to the issues the petitioner brings before the Board. The Court rejected the County's argument that a petitioner must raise a legal "issue" to the local government in order to raise that legal issue in a petition to the Board. The Court adopted the reasoning of the Central Board:

> If a petitioner's participation [before the local government] is reasonably related to the petitioner's issue as presented to the Board, then the petitioner has standing to raise and argue that issue.[29]

The Court concluded this approach furthers the GMA's goals of encouraging meaningful public participation in the local government planning process and achieving local government compliance with the GMA:

> Persons who wish to raise issues before a growth management hearings board should participate actively in the planning process for the geographic areas or subjects of interest to them. The GMA assumes the local government will have an opportunity to address those concerns before an appeal to the growth management hearings board.[30]

The Boards have substantial discretion to determine whether a petitioner has "participation standing." The Court explicitly recognized that the Boards have considerable discretion to determine standing in each case:

> [I]t would be unrealistic given the time and resource constraint inherent in the planning process to require each individual petitioner to demonstrate to the growth management hearings board that he or she raised a specific legal issue before the board can consider it. The growth management hearings boards, with their expertise in these matters and their role as finders of fact, are best suited to decide whether, under the facts presented in a particular circumstance, a petitioner has established participation in a "matter."[31]

[28] For a variety of reasons, none of the petitioners before the Board participated in the appeal in superior court, and no party appeared to defend the substantive portions of the Board's decision. The Department of Community, Trade, and Economic Development (CTED) intervened to address legal issues.

[29] 100 Wn. App. at 673 (quoting *Alpine v. Kitsap Cy.*, CPSGMHB No. 98-3-0032c, Order on Dispositive Motions (Oct. 7, 1998)). This holding by the Court was codified into RCW 36.70A.280 by the 2003 Legislature. *See* Laws of 2003, ch. 332.

[30] *Id.* at 674.

[31] *Id.*

The time to appeal a Board's final order begins to run on each party when that party is served with a copy of the order. The Court also addressed several procedural issues. Most notably, it held that under the Administrative Procedure Act, the time for an appeal to Superior Court begins to run for each party when that party is served with a copy of the Board's final order.

Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (July 20, 2000).

Factual and Procedural Background

A land company owned a large parcel several miles outside the designated interim urban growth area (IUGA). In 1996, the County rezoned the parcel to allow residential subdivisions, after which the land company submitted a plat application for a residential subdivision. The County approved the application and issued a mitigated determination of nonsignificance (MDNS) under SEPA, concluding no environmental impact statement (EIS) was required for the project. The Wenatchee Sportsmen Association challenged the approval and the MDNS by filing a timely petition under the Land Use Petition Act (LUPA). The Superior Court reversed, holding the project complied with the rezone but not with the GMA's restrictions on urban growth outside the IUGA.

The land company obtained direct review by the Supreme Court

The Court's Decision

The Supreme Court reversed.

The Court found the project approval was consistent with the 1996 rezone and that compliance with the IUGA had not been timely appealed.

Growth Management Hearings Boards have no jurisdiction to hear a petition alleging a site-specific rezone does not comply with the GMA. The Supreme Court rejected the land company's argument that the Association could not bring a LUPA challenge because it had not appealed the County's rezone first to the Growth Management Hearings Board. The Court held a site-specific rezone is not a development regulation under the GMA; the Board thus has no jurisdiction to hear a petition alleging it does not comply with the GMA.

A LUPA challenge to a site-specific rezone decision must be filed within 21 days of the decision. The Court agreed with the land company that the Association was barred from challenging the decision to rezone because it did not file its LUPA petition within 21 days after the rezone decision was made. On that basis, the Court concluded it was too late for the Association to argue that the rezone decision did not comply with the GMA. The only question for the Court to consider under the LUPA challenge as filed was whether the plat application complied with the applicable zoning ordinances.

The Court sidestepped the Association's argument that the rezone was only one of the applicable land use laws in effect. The Court recharacterized the argument as one asserting incompatible ordinances:

> [T]he issue of whether the RR-1 zoning allows for urban growth outside of an IUGA should have been raised in a timely LUPA challenge to the rezone, not in the later challenge to the plat. At that time a court reviewing the rezone decision could have considered whether the minimum density allowed by the RR-1 district was compatible with the IUGA. If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable.[32]

[32] 141 Wn.2d at 181.

Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 4 P.3d 115 (July 20, 2000).

Factual and Procedural Background

A developer sought to develop a planned unit development (PUD) in rural Kitsap County, outside the designated interim urban growth area (IUGA). The County issued a mitigated determination of nonsignificance (MDNS) and approved the project. The County Commissioners affirmed, but the Superior Court reversed.

In a published decision at 95 Wn. App. 383, 974 P.2d 863, the Court of Appeals held the application vested to the zoning laws in effect at the time it was filed, including the County ordinance designating IUGAs; and the designated IUGA could be an effective development regulation, even without local ordinances having been adopted to implement it.

The Court's Decision

The Supreme Court reversed the Court of Appeals.

If a Growth Management Hearings Board finds a provision in a comprehensive plan or development regulation to be noncompliant with the GMA, the provision automatically becomes invalid at the end of the remand period unless the local government revises it to achieve compliance. As the Supreme Court noted, timing is important in this case. Kitsap County adopted an IUGA in October 1993, which was challenged. In June 1994, the Board found the IUGA did not comply with the GMA and remanded for compliance by October 3, 1994. Rather than amending the IUGA, the County adopted a comprehensive plan on December 29, 1994, which contained final UGAs. In the interim, on December 15, 1994, the developer submitted a completed preliminary plat application and PUD proposal.

The Court held the IUGA was not in effect between October 3 and December 29, 1994, because the County did not act to bring it into compliance with the GMA. Rather, the former zoning ordinance, which had been supplanted by the IUGA, applied. The Court held a noncomplying regulation remains in effect only during the period of remand, to allow time for it to be amended. At the expiration of the remand period, it automatically becomes invalid if it has not been revised to come into compliance.

A preliminary plat application coupled with a PUD proposal creates a vested right to have the entire application, including the PUD, considered under the ordinances in effect at the time of filing. The Court agreed the PUD was not a rezone because it was permitted under the former Kitsap County zoning ordinance that had been revived temporarily. The Court held the preliminary plat application filed together with the PUD proposal created a vested right to have the entire application, including the PUD, considered under the former zoning ordinance.

The Supreme Court remanded the MDNS issue.

The Dissent

Justice Talmadge dissented, arguing that the majority did not treat the "crucial concern" in the case—the effect of the IUGA on development:

> The developers argue an IUGA is not a "development regulation" as that term is defined in the GMA. RCW 36.70A.030. Rather, their argument goes, a county must enact further, more specific ordinances to implement the IUGA, and the IUGA is therefore ineffective in and of itself to prevent growth outside its boundaries. The glaring flaw in this argument, however, is that the GMA itself describes an IUGA as a development regulation. RCW 36.70A.110(5). Aside from definitional niceties, there can be no question an interim urban growth boundary was to have the same controlling, regulatory effect as the permanent urban growth boundary, i.e., to prevent urban growth in rural areas.[33]

[33] *Id.* at 198-99.

Faben Point Neighbors v. City of Mercer Island, 102 Wn. App. 775, 11 P.3d 322 (Aug. 28, 2000), *review denied*, 142 Wn.2d 1027 (Feb. 6, 2001).

Factual and Procedural Background

A developer proposed to subdivide a 2.1-acre parcel on the northern tip of Mercer Island into 6 lots. The City's zoning code required that lots must be at least 15,000 square feet, with minimum widths and depths. The City's critical areas ordinance (CAO), adopted under the GMA, required that each lot must have a 3,000-square-foot building pad. All of the lots satisfied the 15,000-square-foot requirement and the 3,000-square-foot building pad requirement, but four of the lots did not meet the width and depth requirement. The City approved the subdivision anyway and a neighborhood group filed a land use petition challenging the approval. The Superior Court reversed.

The Court's Decision

The Court of Appeals affirmed the reversal.

A pre-GMA zoning ordinance may be superseded by development regulations adopted under the GMA, but only if the GMA regulations actually conflict with the pre-GMA ordinance. Otherwise, the pre-GMA ordinance must be given effect alongside the GMA regulations. The City relied on a provision in the CAO that any conflict between the CAO and other zoning regulations would be resolved in favor of the CAO. The City found a conflict and determined the CAO superseded the width and depth requirement in the zoning code.

The developer argued on appeal that while there is no "logical" conflict between the CAO and the lot width and depth requirements, there is a "philosophical or policy" conflict. The developer reasoned as follows:

- The CAO was adopted pursuant to the GMA;
- Two of the GMA's policies are to encourage development in urban areas and to reduce sprawl;
- All of Mercer Island is within an urban growth area, but most of the remaining lots are difficult to develop because of irregular shapes or terrain;
- The City cannot give effect to the zoning code's rigid dimension requirements and at the same time satisfy the GMA's goals encouraging urban development.

The Court rejected the argument, finding no conflict between the dimension requirements and the CAO. It noted that if the City believes a conflict exists between its growth management objectives and its ordinances, it can amend its development code. "Until then, in the absence of an actual conflict, the two provisions should be read together."[34]

King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 14 P.3d 133 (Dec. 14, 2000).

Factual and Procedural Background

King County's 1994 comprehensive plan designated some 40,500 acres of agricultural lands of long-term commercial significance as agricultural production districts (APDs). In response to increasing demand for athletic fields, the County amended its comprehensive plan and development regulations in 1997 to allow "active recreational" uses on designated agricultural lands in the APDs. Several organizations representing agricultural interests challenged the 1997 amendments.

In the proceedings before the Central Board, the County and the athletic proponents argued that the parcels at issue had not been used for agriculture for years, and that their use for recreation preserve the agricultural soils and would buffer other agricultural lands from encroaching urban land uses. The Board rejected those arguments and invalidated the amendments, finding that several provisions in

[34] 102 Wn. App. at 781.

the GMA, read together, created an "agricultural conservation imperative."

The Superior Court reversed.

The Court's Decision

The Supreme Court, in an 8-1 decision, reinstated the Board's decision, including the Board's determination that the relevant provisions of the GMA evidence an "agricultural conservation imperative."

This case follows *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998), the first appellate decision addressing the GMA's agricultural lands provisions. Just as it did in *City of Redmond*, the Court here construed the GMA's agricultural lands provisions to mandate meaningful conservation of designated agricultural lands.

The GMA's agricultural lands provisions impose a mandatory duty to designate and conserve agricultural lands of long-term commercial significance. Acknowledging that the GMA's planning goals are not listed in any priority order, the Court nevertheless found the mandatory character of the GMA's agricultural lands provisions (RCW 36.70A.020(8), .060, .170) imposes "a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry."[35] In contrast, the recreation provisions (RCW 36.70A.020(9), .150, .160) merely "encourage" the designation of recreational uses. The Court held the County's interpretation of the GMA (to allow active recreation on agricultural lands) would "result in a net loss of designated agricultural land," contrary to the " Legislature's stated intent to conserve such land in order to maintain and enhance the agricultural industry."[36]

Although a county may use "innovative zoning techniques" to conserve agricultural lands, the use of such techniques must satisfy the GMA's mandate to maintain and enhance the agricultural industry. The County argued its amendments were allowed under RCW 36.70A.177, a 1997 amendment allowing local governments to use "innovative zoning techniques" to conserve agricultural lands. The Court disagreed:

> In order to constitute an innovative zoning technique consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry.
>
> . . . [RCW 36.70A.177] encourages counties to limit innovative techniques "to lands with poor soils or otherwise not suitable for agricultural purposes." . . . Read logically, this phrase means that the County may encourage nonagricultural uses where the soils are poor or the land is unsuitable for agriculture. It should not be read that the County may encourage nonagricultural uses whether or not the soils are poor or unsuitable for agriculture. The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes. Therefore, the properties in this case do not qualify for "innovative zoning techniques."
>
> . . .
>
> The County has broad discretion to develop a comprehensive plan and development regulations that are suited to its local circumstances. However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques. After properly designating agricultural lands in the APD, the County may not then undermine the Act's agricultural conservation mandate by adopting "innovative" amendments that allow the conversion of entire parcels of prime agricultural soils to an unrelated use. The explicit purpose of RCW 36.70A.177 is to provide for creative

[35] 142 Wn.2d at 558.

[36] *Id.* at 558-59.

> alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.[37]

The Court explicitly affirmed the Board's conclusions that the GMA's agricultural provisions evidence a legislative mandate for the conservation of agricultural land, and that RCW 36.70A.177 must be interpreted to harmonize with that mandate. Nothing in the GMA permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture. Although the GMA encourages recreational uses of land, there is no conservation mandate for recreational use, as there is for agricultural use.

Local government's discretion in implementing the GMA is bounded by the goals and requirements of the GMA. The Court acknowledged that local governments have broad discretion in developing comprehensive plans and development regulations tailored to local circumstances. Interpreting RCW 36.70A.3201, the Court explained that local discretion is bounded by the goals and requirements of the GMA: while the Growth Management Hearings Boards are to give deference to counties and cities in how they plan for growth, the Boards nevertheless are obligated to review local governments' exercise of discretion for consistency with the goals and requirements of the GMA.

APPELLATE DECISIONS IN 2001

Moore v. Whitman County, 143 Wn.2d 96, 18 P.3d 566 (Feb. 22, 2001).

Factual and Procedural Background

In two petitions to the Eastern Board, the Moores challenged Whitman County's critical areas ordinances (CAOs). The County had exempted all agricultural lands from the CAOs unless and until agricultural use of a parcel changed. Ultimately, after the County amended the CAOs slightly, the Board found the CAOs complied with the GMA. The Superior Court reversed, and the Court of Appeals certified the case to the Supreme Court.

The Court's Decision

The Supreme Court reversed the Superior Court and dismissed the Moores' challenge.

The Growth Management Hearings Boards lack jurisdiction to hear petitions for review arising in counties that do not plan under RCW 36.70A.040. The County, pointing to RCW 36.70A.250, argued that the Eastern Board has jurisdiction to hear only petitions arising in counties planning under RCW 36.70A.040. The Moores and others responded that RCW 36.70A.250 should be read together with all the enforcement sections of the GMA, and in that context should be read more as a venue statute, dividing the counties and cities in the state into three regions to provide regional sensitivity in administrative review of local compliance with the GMA.

The Court held RCW 36.70A.250 limits the jurisdiction of the Eastern Board to counties located east of the Cascade Mountains that are required to or choose to plan under RCW 36.70A.040. Finding Whitman County does not plan under RCW 36.70A.040, the Court held the Board had no jurisdiction to hear the Moores' appeal and dismissed the action.

The Court's explanation of its holding makes it apparent that the Western Board's jurisdiction similarly is limited only to petitions arising in counties planning under RCW 36.70A.040.

Challenges to GMA compliance arising in counties that do not plan under RCW 36.70A.040 are to be heard in Superior Court. The Court explained that courts serve as the "traditional, if not preferred, forum" for resolving land use disputes and suggested in dictum that a challenge to GMA compliance arising in a "non-planning" county could be heard under the Land Use Petition Act (RCW 36.70C) or RCW 36.70A.295.

[37] *Id.* at 560-61 (emphasis by the Court).

Ahmann-Yamane, LLC v. Tabler, 105 Wn. App. 103, 19 P.3d 436 (Mar. 1, 2001) (amended Apr. 3, 2001), *review denied*, 144 Wn.2d 1011 (Sept. 5, 2001).

This decision is not a GMA case, but it is included here because the Court addressed the use of the GMA and an interim urban growth area (IUGA) as standards for land use approval or denial.

Factual and Procedural Background

This was a legal malpractice case against Mr. Tabler resulting from his improper filing of an appeal of a rezoning application that was denied. As part of its analysis, the Court had to determine whether the attorney's negligence caused harm to Ahmann-Yamane.

Ahmann-Yamane owned some 165 acres of agricultural land northwest of Moses Lake in Grant County. The land was outside the IUGA established by the County under the GMA. In 1998, Ahmann-Yamane filed an application to have the land rezoned to allow subdivision into 1- to 3-acre residential lots. The Board of County Commissioners ultimately denied the application.

On appeal, Ahmann-Yamane argued that the County's denial of its rezone application would have been reversed by the Superior Court if it had been filed properly.

The Court's Decision

The Court of Appeals disagreed, addressing an interesting pair of arguments based on *Association of Rural Residents v. Kitsap County*, 95 Wn. App. 383, 974 P.2d 863 (1999), *aff'd in part, rev'd in part*, 141 Wn.2d 185, 4 P.3d 115 (2000). In *Rural Residents*, the Court of Appeals held Kitsap County violated the GMA by approving a planned unit development because it allowed urban development to occur outside the County's IUGA. Mr. Tabler argued the facts of this case were indistinguishable from those in *Rural Residents*, so the rezone could not be approved without violating the GMA. Mr. Tabler therefore maintained no harm had resulted from his error because the rezone could not have been granted. Ahmann-Yamane replied that the Supreme Court had reversed this holding in *Rural Residents*.

A local government should apply the goals and requirements of the GMA and its own comprehensive plan provisions and development regulations when considering land use applications. The Court of Appeals rejected Ahmann-Yamane's characterization of the Supreme Court's decision in *Rural Residents*:

> The Court of Appeals decision was reversed because the development application vested to the zoning laws in effect when the application was filed, and because the IUGA was not in effect at that time, the former land use ordinance should have been applied. . . . The Supreme Court did not, however, hold that the GMA and the IUGA are improper standards for land use approval or denial. . . .[38]

The Court concluded Grant County had properly applied the goals of the GMA, the elements of its comprehensive plan, and the coverage of its IUGA in denying the application.

Citizens for Responsible and Organized Planning (CROP) v. Chelan County, 105 Wn. App. 753, 21 P.3d 304 (Apr. 10, 2001).

Factual and Procedural Background

Landowners applied to plat a residential subdivision outside Chelan County's IUGA boundary. The Planning Commission recommended denial, but the Board of County Commissioners approved it on the ground that it was bound by previous Commissioners' decisions approving similar subdivisions. CROP appealed to Superior Court, which reversed and remanded. The Commissioners again approved the subdivision. CROP again appealed, and this time the Superior Court affirmed.

[38] 105 Wn. App. at 115.

The Court's Decision

The Court of Appeals reversed. It did not decide whether the proposed subdivision was urban growth; instead, it held the Commissioners' approval was not supported by substantial evidence. The Court found the Commissioners had never determined whether the proposed subdivision was urban, and the Court held such a determination was required for compliance with the GMA and the IUGA boundaries:

> The question is whether the Matthewses' subdivision is urban. Not, have we done this before?[39]

The vested rights doctrine does not require a local government to approve a land use application solely because other similar applications have been improperly approved under the applicable laws. The Court characterized the landowners' argument as a misapplication of the vested rights doctrine. They were entitled to application of the laws at the time they filed their subdivision application—i.e., to application of the GMA as it existed at that time and to the County resolution designating IUGA boundaries—but they were not entitled to have their subdivision application automatically approved simply because other similar subdivisions had been approved under the same laws.

A resolution adopted under the GMA must be read together with the GMA when challenged as unconstitutionally vague. The Court rejected the landowners' argument that the resolution designating IUGA boundaries was unconstitutionally vague. The Court held the resolution must be read in conjunction with the GMA and its policies, definitions, and requirements in RCW 36.70A.020, .030, and .110. When so read, the resolution was not unconstitutionally vague.

Somers v. Snohomish County, 105 Wn. App. 937, 21 P.3d 1165 (Apr. 23, 2001).

Factual and Procedural Background

Snohomish County adopted an ordinance establishing the Monroe Interim Urban Growth Area (IUGA) in October 1993. In August 1994, a developer applied for preliminary plat approval of a subdivision lying outside the IUGA. The pre-GMA zoning of the area permitted minimum lot sizes of 20,000 square feet. The hearing examiner found no guidance in the IUGA ordinance or elsewhere in the County Code as to what land use densities were permissible outside the IUGA, and he found the GMA's definition of urban growth to be "quite subjective." He therefore approved the application.

Responding to a LUPA petition, the Superior Court held the IUGA was a self-executing land use regulation prohibiting urban growth outside its boundaries.

The Court's Decision

The Court of Appeals reversed.

A LUPA complaint that even suggests noncompliance with the GMA may be dismissed for lack of subject matter jurisdiction. The Court held the Superior Court lacked subject matter jurisdiction under LUPA to hear the appeal of the County's decision. On its face, the LUPA petition challenged the County's approval of the subdivision, not the IUGA or the pre-GMA zoning. But the developer and the County argued the petition collaterally challenged the pre-GMA zoning "to the extent that it permits 'urban density' outside the Monroe IUGA, thereby raising GMA compliance issues that are beyond the proper scope of a LUPA appeal."[40] The Court of Appeals, relying on a single sentence in one paragraph of the LUPA complaint and on subsequent questioning during oral argument, held the neighbors' "real argument is that the County failed to comply with the GMA when it applied a pre-existing ordinance that permitted

[39] 105 Wn. App. at 760.

[40] 105 Wn. App. at 943.

urban densities outside of the IUGA,"[41] a question of GMA compliance over which the Growth Management Hearings Boards have exclusive jurisdiction.

A LUPA petition that does not allege a conflict with the underlying comprehensive plan or zoning may be dismissed for lack of subject matter jurisdiction. The LUPA petitioners argued the Growth Management Hearings Board could not hear this challenge under *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997) (the Boards cannot render a decision on a specific development project). The Court of Appeals held *Mount Vernon* did not control because it involved an alleged conflict with the underlying zoning, while the challenge in this appeal did not allege any conflict with the underlying zoning. The Court implicitly treated the IUGA simply as a requirement of the GMA, not as a development regulation the County had adopted.

Pre-GMA zoning that does not comply with the GMA may be challenged in a petition to a Growth Management Hearings Board as a failure-to-act claim. The Court interpreted the decision in *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), to allow an appeal to the pre-GMA zoning through a failure-to-act claim. In other words, the petitioners should have alleged the County was in noncompliance with the GMA because it had not taken action to adopt development regulations specifying limits on urban growth in the rural area and instead was continuing to enforce its pre-GMA zoning.

Unless a local government explicitly provides notice that it will retain pre-GMA zoning, there may be no time limit as to when a failure-to-act claim may be filed. The Court rejected the argument that the 60-day period for filing a failure-to-act claim began to run on the date the Monroe IUGA was adopted. The Court held "there is a question as to whether the proper statute of limitations begins to run in the absence of notice of such action by the County,"[42] which the Court described as a potential trap for the unwary:

> All should be on notice that, once a county draws its IUGA, zoning outside the boundary that conflicts in any way with the GMA may be appealable to the appropriate GMHB. That may be the case even without a specific project to trigger the inquiry, as in this case.[43]

The decision is consistent with *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 4 P.3d 115 (2000), and *Caswell v. Pierce County*, 99 Wn. App. 194, 992 P.2d 534, *review denied*, 142 Wn.2d 1010, 16 P.3d 1265 (2000). All three decisions treat the IUGA boundary not as a development regulation, but as some arbitrary line that is of no consequence unless rural zoning is changed as well.[44]

Sammamish Community Council v. City of Bellevue, 108 Wn. App. 46, 29 P.3d 728 (Aug. 20, 2001), *review denied*, 145 Wn.2d 1037 (Apr. 2, 2002).

Factual and Procedural Background

RCW 36.70A.070(6)(a)(iii)(B) requires that cities planning under RCW 36.70A.040 include in their comprehensive plans a transportation element that specifies level of service (LOS)

[41] *Id.* at 945.

[42] *Id.* at 949.

[43] *Id.* at 949. Following this decision, petitioners attempting LUPA challenges must be very careful in crafting their petitions. Any claim in a petition that can be construed as a challenge to the underlying development regulation may be enough to cause their petition to be dismissed. Impliedly, however, the reverse may also be true: if a GMA petition for review of a local legislative act includes an allegation against a particular project (even if the particular project application triggered the challenge to the ordinance or resolution), that allegation may be enough for a reviewing court to conclude the matter should have been brought as a LUPA appeal. The "trap for the unwary" the Court described may swing both ways.

[44] These courts have either not accepted or not understood that the IUGA was intended to constrain urban sprawl while a county finished its comprehensive planning.

standards for local streets and roads. RCW 36.70A.070(6)(b) prohibits new development that would cause the LOS at relevant intersections to drop below adopted LOS standards "unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development." This prohibition is referred to as the GMA's "transportation concurrency requirement." The City of Bellevue implemented these requirements in its comprehensive plan and Traffic Standards Code (TSC).

Under RCW 35.14.040, two areas-specific community councils may "disapprove" a comprehensive plan or zoning ordinance adopted by the City of Bellevue. Such disapproval does not affect the application of any ordinance or resolution outside the jurisdiction of the council. RCW 35.14.040.

In 1998, the City amended its TSC to adopt new methodology for calculating traffic volume and traffic capacity, based on the recommendation of a transportation task force. Both community councils objected to the new methodology, arguing it would allow more traffic in their neighborhoods without violating LOS standards, thus circumventing the GMA's transportation concurrency requirement. Purporting to exercise their disapproval authority under RCW 35.14.040, both Councils disapproved the amendment to the TSC.

The Superior Court (1) dismissed the claim that the new methodology effectively modified LOS standards and therefore should have been adopted as a comprehensive plan amendment; (2) ruled that the TSC was a zoning ordinance subject to the councils' disapproval authority; and (3) ruled that the City must disregard its new methodology when applying its TSC to proposed new development anywhere in the City that might impact traffic in intersections within the councils' jurisdiction.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.

The GMA's transportation concurrency requirement does not transform an ordinance regulating the calculation of traffic volume and capacity into a zoning ordinance. The Court first determined the TSC was not a zoning ordinance, for three reasons: (1) it "does not control property improvements or regulate design of buildings or the character of use to which property may be built"[45]; (2) even though the TSC divided the City into geographic zones, "an ordinance is not necessarily a zoning ordinance simply because it divides property"[46] if it does not regulate the use of land, buildings, and structures within those zones; and (3) "[t]he GMA's requirement that the City prohibit development if LOS at intersections drops below applicable standards without mitigation does not transform [the ordinance adopting new methodology] into a zoning ordinance."[47]

Finding the TSC was not a zoning ordinance, the Court held the councils were not authorized under RCW 34.15.040 to disapprove the amendment to the TSC.

Next, the Court affirmed the dismissal of the councils' claim that the new methodology effectively amended the comprehensive plan by changing the LOS standards.

Finally, the Court held that even if the councils' disapproval authority extended to the TSC amendment, their disapproval would not affect how the City applies the TSC to proposed land use development projects outside the Councils' jurisdictional boundaries.

Moss v. City of Bellingham, 109 Wn. App. 6, 31 P.3d 703 (Sept. 17, 2001), *review denied*, 146 Wn.2d 1017 (July 1, 2002).

Factual and Procedural Background

The City issued a preliminary plat approval for a large subdivision, after a Determination of Nonsignificance (DNS) under SEPA. A group of citizens filed a LUPA petition challenging the approval, arguing a full environmental impact

[45] 108 Wn. App. at 53.

[46] *Id.* at 54.

[47] *Id.*

statement (EIS) should have been prepared. The developer responded that 1995 legislation integrating SEPA project review with the GMA allowed the City's planners to rely on existing laws and regulations, and to mitigate the adverse impacts of the project in order to bring it below the threshold for EIS preparation.

The Superior Court held for the City.

The Court's Decision

The Court of Appeals affirmed.

When reviewing the environmental impacts of a proposed project and making a threshold determination under SEPA, a local government may rely on environmental analysis and mitigation integrated into its comprehensive plan and development regulations. The 1995 Legislature enacted ESHB 1724 (1995 Laws, ch. 347) which partially integrated GMA and SEPA. That bill added RCW 43.21C.240 to SEPA, which, as implemented in WAC 197-11-158, "substantially streamlines the threshold determination process for cities and counties planning under the GMA by authorizing the SEPA official to rely on existing plans, laws and regulations in meeting SEPA requirements."[48]

The Court also relied on language in RCW 36.70B.030, providing that "fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review" and authorizing local governments to "determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply."[49]

A local government may use existing comprehensive plans and development regulations for the analysis and mitigation of a project's environmental impacts, filling in the gaps as needed by imposing mitigation requirements under SEPA. Much of the Court's analysis focused on the SEPA rules adopted or amended in response to ESHB 1724. WAC 197-11-158(1) authorizes a GMA county or city to determine that the requirements for environmental analysis, protection and mitigation in its development regulations, comprehensive plan, and other applicable laws or rules provide adequate analysis of and mitigation for some or all of a project's adverse impacts. The Court rejected the citizens' argument that WAC 197-11-158 applies only where all impacts can be addressed by existing plans and rules.

The Court rejected the suggestion that an EIS would be required only for a completely different land use from that discussed in the comprehensive plan:

> [M]ore than mere consistency with the comprehensive plan and development regulations is required to avoid EIS preparation. WAC 197-11-158 and WAC 197-11-350 also require that the specific adverse environmental impacts of the project be adequately mitigated.[50]

This language is dictum; the citizens did not allege inconsistency with the comprehensive plan and development regulations.

APPELLATE DECISIONS IN 2002

Department Of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (Mar. 28, 2002).

This decision did not interpret the GMA, but it is included here because it affects the availability of water for development.

[48] 109 Wn. App. at 16. The 2003 Legislature amended SEPA to allow SEPA exemptions for urban infill in urban growth areas where the comprehensive plan was subject to an environmental impact statement under SEPA. *See* Laws of 2003, ch. 298.

[49] *Id.* at 17-18.

[50] *Id.* at 26.

RCW 19.27.097(1) generally requires each applicant for a building permit to provide evidence of an adequate water supply for the intended use of the building. Prior to this decision, some counties and cities planned for future development assuming the 5000 gallons per day (gpd) limit in RCW 90.44.050 did not apply to a group of wells constructed as part of a single development. Those counties and cities may need to revise their capital facility planning provisions and/or development regulations to account the effects of this decision.

Factual and Procedural Background

In 1999, a developer purchased 20 lots in the Yakima River Basin and decided to construct individual wells on each lot, believing it could do so without obtaining a permit from Ecology under RCW 90.44. Ecology determined the permit exemption in RCW 90.40.050 for groundwater withdrawals for domestic uses of 5,000 gpd or less did not apply to a group of wells constructed as part of a single development where withdrawal from the wells would exceed 5,000 gpd. Ecology sought a declaration confirming its interpretation of RCW 90.44.050 in Superior Court, but the Court ruled for the developer. Ecology appealed and obtained direct review in the Supreme Court.

The Court's Decision

The Supreme Court agreed with Ecology that ***the 5,000 gpd limit in RCW 90.44.050 applies to groups uses as well as single uses.*** The developer was entitled only to a single exemption. The Court also held the permit must be acquired before any well is dug and before any water is put to beneficial use.

The Dissents

Justice Owens, joined by Justices Bridge and C. Johnson, dissented, arguing the exemption is necessary to promote sensible growth because large water supply installations often are not feasible in rural areas. In a footnote, the majority acknowledged that water allocation decisions affect patterns and extent of community growth, but explained it is the job of the Legislature, not the courts, to change water resource management policy and law.

Montlake Community Club v. Central Puget Sound Growth Management Hearings Board, 110 Wn. App. 731, 43 P.3d 57 (Apr. 1, 2002).

Factual and Procedural Background

In 1994, the City of Seattle adopted its comprehensive plan under the GMA. The plan designated five "urban village" areas planned for high density. Concerns about traffic congestion in the Montlake area, which lies outside the designated University Community Urban Center, prompted members of the Montlake Community Club to ask the City to study traffic impacts at eight specific intersections as part of the subarea planning process. The City did so, using the same "screenline" methodology it used in the 1994 comprehensive plan.

Rather than determining a traffic volume-to-capacity ratio for individual intersections and roadway segments, screenline methodology takes a broader approach, which includes shifting traffic to alternative routes and measures to reduce travel demand. Because the screenline is a relative measure of traffic flow, rather than a fixed limit on the number of vehicles, the capacity of some intersections could be exceeded without the screenline being exceeded. The Club challenged the subarea plan and the screenline methodology, asserting they violated the transportation and concurrency requirements of the GMA.

The Board's Decision

A traffic-planning methodology adopted in the comprehensive plan that is not challenged (or that is challenged and upheld) when the comprehensive plan is adopted may not be challenged later when the methodology is implemented. The Board ruled the Club's transportation and concurrency arguments were untimely: the time to have challenged the screenline methodology was five years earlier when the City adopted its comprehensive plan. The Board noted it had reviewed and upheld the screenline methodology in *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 94-3-0016, Final Decision and Order (Apr. 4, 1995).

The Board found the subarea plan was consistent with the comprehensive plan, as required in RCW 36.70A.080, and it did not amend the methodology adopted in the comprehensive plan, which would have started a new 60-day clock for challenging the methodology.

The Courts' Decisions

The Superior Court and the Court of Appeals both affirmed the Board's dismissal of the Club's petition for review as untimely.

1515–1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corporation, 146 Wn.2d 194, 43 P.3d 1233 (Apr. 18, 2002).

This decision did not interpret the GMA, but it is included here because it illustrates issues arising from development on marginal lots as cities attempt to allow for increased urban density to meet GMA goals.

Factual and Procedural Background

A developer built three condominiums on a lot that consisted of a narrow flat area which dropped down a steep slope to Interstate 5. When the lot was proposed for construction, the City of Seattle was concerned about potential landslides and imposed several conditions on the developer, including a covenant exculpating the City from liability for damages caused by soil movement.

The homeowners were assured repeatedly by the developer that the site was stable and the condominiums would not slip even if the slope moved. Nevertheless, during heavy rains in the winter of 1996-97, soil movement made the condominiums uninhabitable. The homeowners sued the developer, the City, and others for damages.

The Court's Decision

A local government and a property owner may negotiate an agreement that include waivers of liability for risks created by the proposed use of property because of characteristics unique to the property, and such an agreement may bind subsequent property owners. One issue considered by the Supreme Court was whether the exculpatory covenant recorded in the deeds ran with the land, thereby releasing the City from the homeowners' claim that the City negligently granted the permit to build on the site. The City argued innovative land use instruments, like the exculpatory covenant, should be encouraged as the GMA channels development onto more marginal lots in urban areas. Because the City was concerned about possible regulatory takings claims or inverse condemnation actions if it denied building permits on marginal lots, it suggested property owners of marginal land should be free to propose creative solutions and accept the risks of development.

The Supreme Court agreed with the City and held the City was not liable for negligently granting a permit to build on the site, and the exculpatory covenant released the City from liability for soil movement resulting from having issued the permit. The Court remanded to allow the homeowners to pursue claims against the City alleging soil movement caused by negligent maintenance of storm and water drains.

Manke Lumber Company, Inc. v. Central Puget Sound Growth Management Hearings Board, 113 Wn. App. 615, 53 P.3d 1011 (May 17, 2002), *review denied*, 148 Wn.2d 1017 (Mar. 4, 2003).

Factual and Procedural Background

This appeal followed Kitsap County's third (and ultimately successful) attempt to adopt a comprehensive plan that complied with the GMA. Numerous challenges to the third comprehensive plan were resolved by the Central Board, including those of Manke Lumber Company, which alleged the County's designation of its shoreline properties as interim rural forest lands was arbitrary and without substantial evidence in the record, and Warren Posten, who challenged Keyport's removal from designation as an urban growth area. The Superior Court dismissed both appeals.

The Court's Decision

The Court of Appeals affirmed the Board.

The GMA does not require local governments to devise the "best" comprehensive plan, but rather a plan that complies with the GMA and that is suitable for that local government. The Court held Manke had not rebutted the presumption of validity afforded the comprehensive plan, development regulations, and amendments adopted under the GMA. The GMA does not require a local government to use any particular method to develop the rural element of its comprehensive

plan, so long as the plan is guided by the GMA's goals and tailored to local conditions. The GMA allows local governments wide discretion in developing their plans because they must abide by those plans.

The Court held the County acted within its discretion in determining not to designated Keyport as a UGA. It rejected Posten's argument that he was entitled to personal notice of the County's legislative land use decision, finding he had actual notice and effectively participated in the County's public process.

Holbrook, Inc. v. Clark County, 112 Wn. App. 354, 49 P.3d 142 (June 28, 2002), *review denied*, 148 Wn.2d 1017 (Mar. 4, 2003).

Factual and Procedural Background

Holbrook purchased 75 acres of forested land in Clark County, intending to log it then subdivide it into 5-acre lots for development. Under County ordinances then in effect, Holbrook could have divided the property into 5-acre parcels without further County approval.

At the time of Holbrook's purchase, the County was developing its comprehensive plan under the GMA. By the time Holbrook bought the property, County staff had drafted a community framework plan that proposed Holbrook's property and other lands for designation as rural or forest resource land. The County adopted the framework plan in 1993.

Before adopting its comprehensive plan, the County held numerous public meetings, including three devoted specifically to proposed natural resource lands designations. At these meetings, several property owners succeeded in having their properties removed from resource designation. In 1994, the County adopted its final comprehensive plan, which designated 55 acres of Holbrook's property as forest resource land allowing one residential lot per 40 acres.

Throughout its planning process, the County used numerous methods of outreach and notice, including mailings, newsletters, news releases, a telephone hotline, a speakers' bureau, public workshops, fairs and open houses, print and television advertisements, and legal notices in newspapers. Mailed notices and newsletters were sent to all Clark County residents, and legal notices were placed in the local newspapers. However, the County never gave Holbrook individual notice of its actions, although it had Holbrook's Olympia address from assessor's records.

Holbrook learned several months later that its land had been designated. Its request to re-designate its property for development was denied. Holbrook sued for declaratory relief and damages under 42 U.S.C. § 1983, claiming the County violated Holbrook's statutory and constitutional rights by down-zoning its property without adequate notice. The Superior Court found no constitutional violation.

The Court's Decision

The Court of Appeals affirmed.

The GMA does not require counties and cities to provide individual notice to landowners of actions taken under the GMA. The Court rejected Holbrook's arguments that individual notice to landowners is required by RCW 36.70A.035 or WAC 365-190-040. The Court also noted a 1992 Attorney General Opinion concluding neither the GMA nor the planning enabling statutes require individual notice to every landowner whose property may be affected negatively by adoption of a comprehensive plan or development regulations.

Due process does not require counties and cities to provide individual notice to landowners of actions taken under the GMA. The Court also rejected Holbrook's argument that individual notice is required by Article I, Section 12, of the Washington Constitution. Agreeing that the area-wide zoning and comprehensive plan amendments at issue here were legislative, the Court explained that constitutional due process rights do not attach to purely legislative acts. When the challenge is to a legislative enactment, the legislative process provides all the process that is due.

The Court suggested legislative decisions can give rise to individual constitutional due process protections where one person, or

relatively few people, are exceptionally affected by a decision, but Holbrook was not entitled to individual notice on that basis.

Equal protection does not require a county or city to send public notices of action taken under the GMA to landowners who live outside the jurisdiction. The Court held the County did not deprive Holbrook of equal protection of law by sending public notices and newsletters only to residents of Clark County. The relevant class for equal protection analysis under the GMA was all County residents, not just landowners, and it was rational to distinguish residents living in the County from landowners residing in other counties.

Isla Verde International Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (July 11, 2002).

This decision did not interpret the GMA, but it is included here because it involves the appropriate exercise of local governments' authority to require open space set asides when approving development proposals.

This decision does not extinguish or limit local governments' obligation under the GMA to designate and preserve open space. *See* RCW 36.70A.020(9), .070(1), .110(2), .160, .165. The decision does require that local governments ensure that their decisions imposing conditions on development are supported by evidence in the record sufficient to demonstrate the conditions are reasonably necessary to address specific and direct impacts expected from the proposed development.

Factual and Procedural Background

A developer brought a LUPA action challenging conditions imposed by the City for approval of a preliminary plat for residential subdivision. The challenged conditions included a 30% open space set aside and the construction of a secondary limited access road into the development for emergency vehicles.

The Superior Court held both conditions unconstitutional and unlawful. The Court of Appeals held the open space requirement constituted a constitutional taking but upheld the second requirement.

The Court's Decision

The Supreme Court held the open space set aside condition violated RCW 82.02.020, declined to address the constitutional issue, and held the lower courts should not have reached the takings issue.

Development conditions, whether direct or indirect, may not be imposed automatically through legislation; they must be tied to a specific, identified, direct impact of a proposed development on a community. The City argued its open space set aside did not violate RCW 82.02.020 because it did not impose a tax, fee or charge on development, but was instead a police-power based condition imposed pursuant to RCW 58.17.110 to mitigate direct impacts of the proposed development. The Court disagreed, concluding first that RCW 82.02.020 itself contemplates that a required dedication of land or easement is a tax, fee or charge; and second that the City had not established that the 30 percent open space set aside was reasonably necessary as a direct result of the proposed subdivision or reasonably necessary to mitigate a direct impact that was a consequence of the proposed subdivision. A legislative determination of the need for open space in the community generally is not enough to satisfy the exceptions in RCW 82.02.020.

The Court held the developer failed to establish unconstitutionality or other invalidity of the secondary access road condition.

Lewis County v. Western Washington Growth Management Hearings Board, 113 Wn. App. 142, 53 P.3d 44 (Aug. 23, 2002).

Factual and Procedural Background

The County appealed two decisions of the Western Board, but did not pay the filing fees until the Superior Court questioned its jurisdiction to hear the appeals. After briefing and argument, the Court held it lacked

jurisdiction because the County had not timely paid the filing fees.

The Court's Decision

The Court of Appeals affirmed.

To obtain judicial review of a decision of a Growth Management Hearings Board, a county must file its appeal and pay a filing fee within the 30-day period specified in RCW 36.70A.300(5). This requirement is jurisdictional. RCW 36.70A.300(5) specifies the time for obtaining judicial review (30 days) and cross references two other statutes: RCW 34.05.514(1) provides that an appeal is instituted by filing a petition and paying a filing fee in any of three venues; RCW 36.01.050(1) provides that when a county appeals, it may do so in any of three venues. The three venues provided for in RCW 34.05.514(1) and RCW 36.01.050(1) may be the same or different. The Court held Lewis County could select venue for its appeal under either RCW 36.01.050(1) or RCW 34.05.514(1), but it must institute its appeal by filing a petition for judicial review and paying a filing fee under RCW 34.05.514(1) and RCW 36.18.020(2)(c) (specifying the amount of the filing fee).

The Court held the County must file a petition and pay the filing fee within 30 days of the order being appealed, under RCW 36.70A.300(5) (30-day time limit) and RCW 36.70A.514(1) (petition for review is instituted by paying the fee required in RCW 36.18.020). RCW 36.18.060 does not override that requirement when the appellant is the state or a county. The Court harmonized the statutes by holding a county need not pay a filing fee when it first files an appeal of the Board's decision, but it must pay the filing fee within 30 days of the order being appealed.

The County's failure to pay the filing fee within 30 days of the order being appealed deprived the Superior Court of jurisdiction. The Court of Appeals found no compelling reason to waive the jurisdictional defect in this case.

Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (July 25, 2002).

This decision did not interpret the GMA, but it is included here because it limits the opportunity for a local government to appeal its own land use decision, even where that decision may be contrary to law.

The GMA places primary emphasis on the comprehensive plan and implementing development regulations to achieve its goals. This decision demonstrates how the best-laid plans and regulations may be rendered ineffective if they are not applied effectively and consistently.

Factual and Procedural Background

Nykreim and others acquired a 40-acre parcel in rural Chelan County and filed an application for a boundary line adjustment delineating three lots, representing that the parcel previously had been subdivided into three lots. The County approved the application without providing public notice, believing approval to be consistent with RCW 58.17.040(6), which allows an applicant to avoid statutory subdivision requirements if the lot line adjustment does not create new lots.

The landowners then applied for three conditional use permits to allow the construction of a residence on each of the three lots. Several neighbors intervened, concerned the proposed residences were intended for transient overnight rentals. One neighbor alleged the boundary line adjustment violated RCW 58.17.040(2), the applicable County Code, and the boundary lot line adjustment criteria provided in the County boundary line adjustment application and in case law. In response, the County Planning Department reviewed the transaction and withdrew the previously issued certificate of exemption, thus effectively revoking the boundary line adjustment.

Chelan County petitioned the Superior Court for a declaration as to the propriety of the boundary line adjustment. In response, the landowners claimed damages under RCW 64.40 if the Court ruled for the County. The Court ruled for the County and dismissed the

landowners' claim for damages, finding the County had acted within its authority in revoking an erroneously approved boundary line adjustment. The Court of Appeals affirmed.

The Court's Decision

The Supreme Court accepted review to decide whether the County should have sought review under LUPA. The landowners argued judicial review of the boundary line adjustment should have been barred because the County did not timely file a petition for review within 21 days under LUPA. The neighbors and the County asserted LUPA did not apply because the boundary decision was ministerial and LUPA applied only to quasi-judicial decisions.

A county is barred from seeking declaratory relief in lieu of a LUPA action to obtain judicial review of its own land use decision. The Court held LUPA applies to both ministerial and quasi-judicial land use decisions. Because the County had standing under LUPA as an aggrieved or adversely affected person, LUPA provides the exclusive means for the County to have proceeded in Superior Court. The County therefore was barred from seeking declaratory relief in lieu of a LUPA action.

A county's land use decision becomes valid after the deadline for bringing a LUPA petition has passed. Having held LUPA applied, the Court concluded this case was governed by *Wenatchee Sportsmen Ass'n v. Chelan Cy.*, 141 Wn.2d 169, 4 P.3d 123 (2000),[51] under which the boundary line adjustment became valid, despite its questionable legality, once the deadline for challenging it under LUPA had passed. The Court made it clear that the boundary line decision did not limit the County's authority to act appropriately upon future permit applications by the landowners.

[51] In *Wenatchee Sportsmen*, discussed above at page 16, the Court dismissed a LUPA challenge as untimely, even though the challenged residential project constituted impermissible urban growth outside of the designated interim urban growth area. Relying on RCW 36.70C.040(2), the Court held the approval of the project became valid once the opportunity to challenge it passed.

The Dissent

Four members of the Court[52] would have affirmed the Court of Appeals. They would have held the County did not have standing under LUPA because it was not aggrieved or adversely affected by its own land use decision. In that event, a LUPA action would not be available and the 21-day time bar in LUPA would not apply to this action.

City of Burien v. Central Puget Sound Growth Management Hearings Board, 113 Wn. App. 375, 53 P.3d 1028 (Sept. 13, 2002).

Factual and Procedural Background

The City of SeaTac and the Port of Seattle entered into confidential negotiations to settle litigation involving the proposed third runway at Seattle-Tacoma International Airport. The negotiations led to an Interlocal Agreement providing that (1) the City and the Port adopt and implement the planning, land use, and zoning provisions set forth in the Agreement; (2) they would engage in cooperative comprehensive planning related to the Airport and the City's economic development and land use goals; (3) the Agreement would control any conflict with other provisions of their respective comprehensive plans; (4) by a date certain, the City and the Port each would adopt a coordinated land use plan consistent with the Agreement; and (5) the Port would pay SeaTac $26 million dollars as "community relief."

The City of Burien filed a petition for review with the Central Board, alleging SeaTac had not complied with the GMA's public participation requirements. The Board ruled that it did not have jurisdiction to review the Interlocal Agreement, but it did review SeaTac's comprehensive plan amendments adopted pursuant to the Agreement, and concluded the amendments complied with the GMA. The Superior Court affirmed.

[52] Justices Alexander, Owens, C. Johnson, and Madsen.

The Court's Decision

The Growth Management Hearings Boards may have jurisdiction to review amendments to comprehensive plans and development regulations for GMA compliance, even if those amendments are the product of a process conducted outside the GMA. The Court of Appeals affirmed the Board's ruling as to its jurisdiction, holding the Interlocal Agreement and the negotiations that produced it were not executed under the GMA and therefore were not subject to the public participation requirements in RCW 36.70A.140 over which the Board has jurisdiction. The Court also agreed the Board could review the process by which portions of the Agreement became amendments to the plan or zoning code. The Court upheld the Board's determination that the amendments complied with the GMA.

Gobin v. Snohomish County, 304 F.3d 909 (9th Cir., Sept. 18, 2002), *cert. denied,* 538 U.S. 908 (Mar. 10, 2003).

This decision does not interpret the GMA, but it is included here because it addresses the jurisdiction of a local government to apply land use regulations on an Indian reservation.

Factual and Procedural Background

Snohomish County asserted land use jurisdiction over a proposed building project located on Tulalip reservation land owned by registered tribal members. The Tulalip Tribe had adopted land use regulations that would allow 25 homes in the project; the County's land use regulations would allow 10 homes. The completed homes would be sold without regard to tribal membership. The landowners sought a declaratory judgment that the County lacked such jurisdiction over her lands. The District Court agreed with the landowners.

The Court's Decision

The Court of Appeals affirmed, holding (1) the right of Indians to alienate their lands freely does not provide the County a right to impose land use regulations over those lands; (2) Congress did not authorize state and local land use regulation over Indian fee lands when it made those lands freely encumberable; and (3) no exceptional circumstances were present that would warrant County jurisdiction in this case. ***Absent a treaty provision, express authorization by Congress, an agreement with Tribal government, or exceptional circumstances, comprehensive plan provisions and development regulations adopted under the GMA appear not to apply to reservation land.***

Citizens for Responsible Rural Development v. Timberlake Christian Fellowship, 114 Wn. App. 174, 61 P.3d 332 (Sept. 23, 2002), *review denied,* 149 Wn.2d 1013 (May 28, 2003).

Factual and Procedural Background

A church applied for a conditional use permit to build an 80,000 square-foot building on a 63-acre site in rural King County. A group of citizens opposed the application, arguing the proposed building violated the GMA's prohibition on urban growth in the rural area and asking that the building be limited to 20,000 square feet. The County approved a scaled-down building of 48,500 square feet, but a hearing examiner determined that size limitation illegally burdened the church's religious freedom and remanded for assessment of visual impacts. LUPA appeals followed.

The Superior Court reversed. A second hearing examiner upheld the size limitation, but left open the possibility of a second application for subsequent expansion. The Court affirmed, but held the examiner erred in using comprehensive plan policies as site-specific decision criteria.

The Court's Decision

The Court of Appeals affirmed, but reinstated the second hearing examiner's decision, finding the hearing examiner had not inappropriately examined the comprehensive plan policies.

Although the GMA and comprehensive plans do not serve as development regulations, parties are not prevented from arguing that a

specific discretionary approval is inconsistent with the GMA or comprehensive plan policies. The Court rejected the church's argument that neither the GMA nor the comprehensive plan may be applied directly at the project-review level. Acknowledging a conflict between the comprehensive plan and zoning regulations must be resolved in favor of the regulations, the Court held parties are not prevented from arguing that a specific discretionary approval is inconsistent with the GMA or comprehensive plan policies. Such arguments must be analyzed, however, by looking to the GMA and the comprehensive plan to determine whether the local government unreasonably has interpreted its conditional use permit criteria or abused its discretion in imposing conditions on the project.

A proposed urban use may be allowed in the rural area if, by its very nature, it is dependent upon being in a rural area and is functionally and visually compatible with the rural area. The Court adopted the Central Board's analysis that a proposed use meeting the GMA's definition of urban growth nevertheless may be allowed in the rural area as long as "the use, by its very nature, is dependent upon being in a rural area and is compatible with the functional and visual character of rural uses in the immediate vicinity[.]"[53]

Applying that standard in this case, the Court upheld the hearing examiner's findings that (1) there was a sufficient nexus between the proposed location of the church and the area where the largest concentration of the church's members lived, and (2) the proposed project was compatible with the surrounding rural residential neighborhood. The Court explained that the purpose of the GMA is not necessarily frustrated every time urban growth occurs in the rural area, and that churches are not purely rural or urban uses, but fall within a gray zone.

[53] 114 Wn. App. at 184, quoting from *Vashon-Maury v. King Cy.*, CPSGMHB No. 95-3-0008, Final Decision and Order (Oct. 23, 1995).

Wellington River Hollow, LLC v. King County, 121 Wn. App. 224, 54 P.3d 213 (Sept. 23, 2002) (amended Feb. 9, 2004), *review denied*, 149 Wn.2d 1014 (2003)

Factual and Procedural Background

An apartment complex developer sought review of per unit school impact fees assessed by King County for the benefit of a school district located partially in King County, partially in Snohomish County, and partially in incorporated cities. The developer objected to the fact that the fee imposed on its project was not identical to fees imposed by other jurisdictions within the district.

The hearing examiner reduced the impact fee, but the Superior Court reversed and reinstated it.

The Court's Decision

The Court of Appeals affirmed the higher fees reinstated by the Superior Court, holding the developer failed to show the fees were incorrectly calculated or unjust, or in violation of any constitutional provision.

The developer argued the fees were unjust because they were not reasonably related to its development and would fund system improvements that would not reasonably benefit its development in violation of RCW 82.02.050(3) and .060(1). The Court disagreed, holding that ***GMA impact fees need not be spent on infrastructure that would specifically benefit a particular development, but instead need only provide a general benefit to the entire school district.***[54] ***A direct benefit is not required.*** The Court found the school district would benefit from the infrastructure improvements paid for by the impact fees in question, and that the developer failed to demonstrate that the school impact fees were not reasonably related to its development or that they would fund system improvements that will

[54] 121 Wn. App. at 237 (citing *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019 (2000). *New Castle* is discussed above at page 13.

not reasonably benefit its development in violation of RCW 82.02.050 or .060(1).

The developer's constitutional argument was based on the different impact fees levied in different parts of the school district. King County had not entered into any agreement with the other jurisdictions to establish consistent impact fees (nor was there any legal requirement for it to do so).

The developer argued first that the different impact fees violated Article VII, Section 9 of the Washington Constitution (requiring taxes collected by a municipal corporation to be uniform with respect to persons and property within its jurisdiction). The Court disagreed, holding ***Article VII, Section 9 applies only to property taxes, and the impact fees levied under RCW 82.02 were not property taxes subject to Article VII, Section 9.***

The developer also argued impact fees collected to support public schools violated Article XI, Section 12 (limiting the legislature's authority to collect taxes only for "county, city, town, or other municipal purposes"). The Court found no violation, since ***public education long has been recognized in Washington as having both a state and local purpose.***

Thurston County v. The Cooper Point Association, 148 Wn.2d 1, 57 P.3d 1156 (Nov. 21, 2002).

Factual and Procedural Background

Property owners and others challenged Thurston County's decision to extend a sewer line approximately four miles into the rural area on Cooper Point to serve two pre-GMA developments whose sewage systems were projected to fail. The Western Board found the sewer line extension violated RCW 36.70A.110(4), which prohibits governments from extending or expanding "urban governmental services" into rural areas, except in those limited circumstances shown to be "necessary to protect basic public health and safety and the environment."

The Court of Appeals affirmed on direct review.

The Court's Decision

The Supreme Court affirmed the Board.

The Court first determined the sewer line extension was not simply a "replacement" for urban services already existing in the two developed areas, but rather an "extension" of urban services into the rural area. The Court rejected the County's argument that the two developed areas were not really "rural" because of their densities; the Court would not allow the county to disavow its comprehensive plan's designation of the Cooper Point area as "rural" and noted the Cooper Point area has characteristics consistent with the GMA's definition of "rural."

The exception in RCW 36.70A.110(4) must be applied narrowly to protect the rural area for urban sprawl, consistent with the Legislature's intent in enacting the GMA. RCW 36.70A.110(4) allows the extension of urban services into the rural area where "necessary to protect basic public health and safety and the environment." The County advocated a broad definition of "necessary" that would allow it to anticipate and prevent future wastewater management problems that could jeopardize public health and safety and the environment. The Court instead upheld the Board's more restrictive definition of "necessary" as better carrying out the Legislature's intent in enacting the GMA to protect the rural character of an area.

Deference to local policy choices is appropriate only if those choices are consistent with the goals and requirements of the GMA. The Court refused under RCW 36.70A.3201 to require deference to the County's interpretation of "necessary," holding deference is given only to local policy choices that are consistent with the goals and requirements of the GMA. Because the County's proposal did just what the GMA prohibits—extending an urban governmental service into a rural area—the Board was not required to accord deference to County's definition of the term "necessary."

A site-specific development permit must be at issue for RCW 4.48.370 to provide for attorney's fees. The Court held the property owners were not entitled to attorney fees under RCW 4.84.370, which applies only to development permits involving site-specific determinations.

The Dissent

Three justices[55] would have held for the County, based primarily on their contention that the Court gave too much weight to the rural protection goals of the GMA and their belief that the Boards generally should defer to local governments' balancing and harmonizing of the GMA's planning goals.

APPELLATE DECISIONS IN 2003

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 116 Wn. App. 48, 65 P.3d 337 (Mar. 3, 2003), *review denied*, 150 Wn.2d 1007 (Sept. 30, 2003).

Factual and Procedural Background

Since the 1960s, the portion of the Sammamish River Valley lying within the City of Redmond was zoned agricultural. When the City adopted its comprehensive plan in 1995, it reaffirmed that agricultural designation.

Landowners challenged the agricultural designation of their property, alleging their land was not "primarily devoted to" agriculture since it was not in current agricultural use. The City responded that the GMA requires an area-wide approach to designation, rather than a parcel-specific approach, and that individual parcels do not need to be in current agricultural use to be designated as agricultural. In *City of Redmond v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), the Court had upheld the City's interpretation of the "primarily devoted to" requirement, but concluded the agricultural designation was invalid because the City had not implemented a program for the transfer or purchase of development rights as required in RCW 36.70A.060(4).

While the appeal was pending, however, the City changed the designation and zoning in the valley lands from agricultural to interim urban recreation. A citizen challenged the new designation and zoning in a petition to the Central Board. The Board characterized the threshold question whether lands that have been designated and regulated as agricultural lands of long-term commercial significance can be "de-designated" and, if so, under what conditions. Although there is no provision in the GMA explicitly mentioning or authorizing de-designation, the Board held agricultural lands may be de-designated "if the record shows demonstrable and conclusive evidence that the Act's definitions and criteria for designation are no longer met."

Relying on the Supreme Court's definition of "devoted to" in *City of Redmond*, the Board found the soil attributes of the land had not changed and that the land was capable of being used for agriculture. Applying the second criterion, that the land be of "long-term commercial significance," the Board found the City had improperly "de-designated" two parcels, but concluded the second criterion no longer was satisfied for the other "de-designated" parcels. The Board accepted the City's argument that development pressures had destroyed the long-term viability of the parcels.

The Superior Court affirmed.

The Court's Decision

The Court of Appeals reversed, concluding the Board impermissibly placed the burden on the City of Redmond to prove the validity of its "de-designation." ***The GMA requires the board to presume a challenged ordinance is valid, and the challenger has the burden of establishing invalidity.***

In addition, the Court found the ordinance purporting to apply an agricultural designation to the properties at issue was never effective.

[55] Justices Sanders, Ireland, and Bridge.

Low Income Housing Institute v. City of Lakewood, 119 Wn. App. 110, 77 P.3d 653 (Sept. 9, 2003).

Factual and Procedural Background

The Low Income Housing Institute (LIHI) challenged Lakewood's comprehensive plan, alleging that it did not further GMA affordable housing goals and was inconsistent with Pierce County's county-wide planning policies.

The Central Board found (1) that LIHI did not demonstrate noncompliance with a specific requirement of the GMA. and (2) that LIHI did not carry its burden to show inconsistency between Lakewood's comprehensive plan and the county-wide planning policies.

The Superior Court affirmed.

The Court's Decision

The Court of Appeals reversed.

A Growth Management Hearings Board must consider both the GMA's goals and its requirements when determining whether a comprehensive plan complies with the GMA. The Court held the Board erred by failing to address whether Lakewood's comprehensive plan furthered RCW 36.70A.020(4) (encouraging the availability of affordable housing). Citing RCW 36.70A.320(3) and *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562, 14 P.3d 133 (2000), the Court held that the Board is required to consider both the GMA's goals and its specific requirements in determining whether a plan complies with the GMA.

A Growth Management Hearings Board must decide all issues requiring resolution. The Board found LIHI had not carried its burden to show inconsistency between the comprehensive plan and the county-wide planning policies. The Court reversed because the Board made no findings regarding the City's current need for affordable housing or how the comprehensive plan would affect the future of affordable housing. Because the Board did not present the basis for its decision, the Court held the Board had failed to decide all issues requiring resolution, as required by RCW 36.70A.290(1) and RCW 34.05.570(3)(f). The Court held the Board erred as a matter of law when it evaluated compliance only with the first requirement of the county-wide planning policies (the requirement to identify and inventory the demand for affordable housing) but not the county-wide planning policies as a whole.

City of Bellevue v. East Bellevue Community Municipal Corp., 119 Wn. App. 405, 76 P.3d 148 (Dec. 15, 2003), *review denied*, 152 Wn.2d 1004 (Sept. 8, 2004).

Factual and Procedural Background

RCW 36.70A.070(6)(a)(iii)(B) requires that cities planning under the GMA include in their comprehensive plans a transportation element that specifies "level of service" standards to set maximum acceptable levels of traffic congestion for local streets and roads. RCW 36.70A.070(6)(b) requires that cities adopt a concurrency ordinance to prohibit development that causes a decline in level of service below the adopted standards, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.

The City of Bellevue's concurrency ordinance exempted certain types of projects from its concurrency requirements. The East Bellevue Community Corporation challenged the addition of neighborhood shopping center redevelopment projects to the list of exemptions. The Central Board held RCW 36.70A.070(6)(b) does not permit exemptions to a concurrency ordinance and invalidated the exemption as substantially interfering with the GMA's concurrency goal, RCW 36.70A.020(12).

The Court's Decision

Bellevue argued that the Community Corporation lacked statutory authority to file petitions with the Board. The Court of Appeals agreed, but reviewed the Board's decision

anyway because other petitioners had raised the same issues to the Board. On the merits, the Court upheld the Board.

Concurrency is a requirement of the GMA. Bellevue argued that the concurrency requirement cannot trump all other goals of the GMA. The Court responded that concurrency is not a goal, but a requirement of the GMA, and that the Board's invalidation of Bellevue's exemption created no conflict between provisions of the GMA. Concurrency is one of several factors in RCW 36.70A.070 that must be satisfied in order to allow development.

A city may not exempt development proposals or categories of developments from its concurrency ordinance. If a proposed development project violates a city's adopted level of service standards, the city has a variety of options available to it: it may change the relevant levels of service, modify traffic patterns to reduce traffic congestion, or creatively address traffic mitigation expenses. But under the clear and plain language of RCW 36.70A.070(6)(b), a city cannot simply exempt the proposal from compliance with traffic standards it has adopted pursuant to the GMA.

APPELLATE DECISIONS IN 2004

Lakeside Industries v. Thurston County, 119 Wn. App. 886, 83 P.3d 443 (Jan. 13, 2004) (amended Feb. 24, 2004), *review denied*, 152 Wn.2d 1015 (Oct. 6, 2004).

Factual and Procedural Background

This is not a GMA case, although it has GMA implications. The County denied an application for a special use permit to construct an asphalt manufacturing and recycling plant, concluding the plant was not consistent with policies in the Nisqually Sub-Area Plan, which had been adopted as part of the County's comprehensive plan under the GMA. The plant proponent filed a LUPA petition.

The Superior Court reversed in part, concluding the sub-area plan precluded asphalt recycling but did not preclude asphalt manufacturing.

The Court's Decision

The Court of Appeals affirmed, holding the County lacked legal authority to apply the sub-area plan's general purpose to deny a use specifically allowed by the zoning code. The Court referred to the general rule that a specific zoning ordinance prevails over an inconsistent comprehensive plan. ***To the extent the comprehensive plan prohibits a use that the zoning code permits, the use is permitted.***

The Court found no conflict between the zoning code and the sub-area plan's specific prohibition on asphalt recycling, and it upheld the exclusion of asphalt recycling or reprocessing from the special use permit.

Grant County Fire Protection District No. 5 v. City of Moses Lake, 145 Wn.2d 702, 42 P.3d 394 (Mar. 14, 2002), *vacated in part*, 150 Wn.2d 791, 83 P.3d 419 (Jan. 29, 2004).

These decision did not interpret the GMA, but they are included here because they have implications for planning to accommodate projected urban growth and provide urban services under the GMA. In 2002, the Supreme Court invalidated the most commonly used method of municipal annexation in Washington, which threatened to undermine the orderly provision of urban services within designated urban growth areas, as directed in RCW 36.70A.110.

In a rare move, the Court vacated that portion of its 2002 decision on reconsideration in 2004.

Factual and Procedural Background

The City of Moses Lake wanted to annex an adjacent area within the designated urban growth area (UGA). To facilitate annexation,

the City entered into "Extraterritorial Utility Extension Agreements" under which the property owners would receive water and sewer services from the City and the City Manager would receive power of attorney to sign any future annexation petition on behalf of the property owners. Using the agreements, the City Manager petitioned for annexation and the City Council approved it.

At about the same time, the City of Yakima prepared to annex a mixed residential area adjacent to the City. The City signed "Outside Utility Agreements" with three-fourths of the property owners in the annexation area, under which the City would provide garbage and refuse service in exchange for consent to future annexation as though the owners had signed an annexation petition. Using those agreements, the City annexed the area.

Appeals of the annexations were consolidated and heard on direct review by the Washington Supreme Court.

Legal Background

In Washington, there have been two primary methods of annexation provided for in statute. In the election method, annexation of contiguous unincorporated land may be initiated by petition or by a resolution of the city council, followed by an election open to voters living in the area to be annexed. RCW 35.13.015 through .120 (non-code cities); RCW 35A.14.015 through .110 (code cities). In the petition method, annexation is initiated by a petition. If the city council accepts the petition, the initiating parties then may circulate a second petition which must be signed by the owners of at least 60% (code cities) or 75% (non-code cities) of the assessed property value in the area to be annexed. Once the second petition is filed, the city council may hold a public hearing and approve the annexation, although it is not required to do so. RCW 35.13.125 through .150 (non-code cities); RCW 35A.14.120 through .150 (code cities). Moses Lake is a code city incorporated under Title 35A RCW. Yakima is a non-code city operating under RCW 35.13. Both cities used the petition method of annexation in these cases.

The petition method was added by the Legislature in 1945 to address difficulties with the election method, which was criticized as "unworkable" and "burdensome" because it granted residents of fringe areas a veto over annexation, thus thwarting municipal planning, the logical expansion of cities, and the provision of urban services. The great majority of annexations since 1945 have been by the petition method.

The Court's 2002 Decision

The Court held the petition method of annexation violates Art. I, § 12 of the Washington Constitution, the state Privileges and Immunities Clause, because it grants special privileges to owners of more highly-valued property.

Legislative Response

The 2003 Legislature responded to the 2002 decision by amending RCW 35.13 and RCW 35A.14 to provide alternative means of annexing unincorporated islands (Laws of 2003, ch. 299) and to provide a direct petition method of annexation that avoids the constitutional infirmities identified by the Court (Laws of 2003, ch. 331).

The Court's 2004 Decision

The Supreme Court granted the Cities' motions for reconsideration and consolidated into the reconsideration an appeal from the City of Snoqualmie that involved an attempt to annex a single large parcel owned by a corporation, which had been blocked by the prior decision. The Court reversed itself and vacated part of its 2002 decision.

The Cities did not ask the Court to reconsider its independent analysis of the Privileges and Immunities Clause in Art. I, § 12; they instead asked the Court to reconsider how it applied that analysis to the petition method of annexation.

On reconsideration, the Court reaffirmed that the state Privileges and Immunities Clause requires an independent constitutional analysis, and that ***the state Privileges and Immunities Clause prohibits favoritism, while the federal***

Equal Protection Clause prohibits discrimination.

Departing from its prior holding, however, the Court held that the statutory right to petition for annexation is not a "privilege" for purposes of Art. I, § 12. The power of annexation is not a right of citizenship, but rather a power of the Legislature which may be delegated to cities. On that basis, the Court held ***the petition method of annexation does not violate the Privileges and Immunities Clause in Art. I, § 12 of the Washington Constitution.***

City of Seattle v. Yes for Seattle, 122 Wn. App. 382, 93 P.3d 176 (June 1, 2004), *review denied*, 153 Wn.2d 1020 (Mar. 1, 2005).

Factual and Procedural Background

In 2002, enough signatures were collected and submitted to place Initiative 80, the "Save Seattle Creeks Initiative," on the ballot in Seattle. The City sued to enjoin the placement of the initiative on the ballot. The Superior Court found the initiative conflicted with the GMA and issued an injunction.

The Court's Decision

The Court of Appeals affirmed. Acknowledging the general rule that courts will not interfere with the political process by reviewing initiatives before they are adopted by voters, the Court held pre-election review is appropriate where the challenge alleges the initiative is beyond the scope of the initiative power authorized by the state constitution.

The initiative process is not available where the Legislature delegates power to act exclusively to the legislative authority of a city, rather than to the city as a corporate entity. Relying on *Snohomish Cy. v. Anderson*, 123 Wn.2d 151, 868 P.2d 116 (1994), and *Brisbane v. Whatcom Cy.*, 125 Wn.2d 345, 884 P.2d 1326 (1994), the Court held ***the Legislature, in enacting the GMA, delegated the authority to act to county and city legislative bodies, and GMA actions cannot be carried out by initiative or referendum.***

The Court concluded the initiative was a "development regulation," as defined in RCW 36.70A.030(7), because it placed controls on development and land use in certain critical areas, and rejected the argument that the initiative was permissible as an exercise of police power authorized under RCW 35.31.090. Explaining that it would "defeat the comprehensive nature of the GMA" and "frustrate its purposes" to allow development regulations to be adopted outside the requirements of the GMA, the Court held "***[a]ll enactments that fall under the GMA definition of development regulations are subject to the requirements of the GMA.***"[56]

Whidbey Environmental Action Network v. Island County, 122 Wn. App. 156, 93 P.3d 885 (June 7, 2004), *review denied*, 153 Wn.2d 1025 (2005).

Factual and Procedural Background

Whidbey Environmental Action Network (WEAN) and others challenged Island County's Comprehensive Plan, zoning code, and fish and wildlife habitat conservation areas regulations. WEAN prevailed on several issues before the Western Board. The Superior Court ruled in favor of the County on all issues.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.[57]

To raise procedural challenges to the Superior Court's review, under the Administrative Procedure Act, of a decision of the Growth Management Hearings Board, the challenger must demonstrate it was prejudiced by the Superior Court's alleged procedural error. WEAN argued the Superior Court (1) exceeded its authority by reaching the ultimate issue (compliance with the GMA) rather than remanding to the Board, contrary to RCW

[56] 122 Wn. App. at 392-93 (emphasis added).

[57] Prior decision at 118 Wn. App. 567, 76 P.3d 1215 withdrawn on reconsideration and superseded by this decision.

34.05.574(1); and (2) failed to review the entire administrative record, as required in RCW 34.05.570. The Court of Appeals rejected these claims because WEAN did not show it had been prejudiced by the alleged judicial errors, as required in RCW 34.05.570.

The GMA does not require any particular methodology for providing a variety of rural densities and uses in the rural element of the comprehensive plan. A county that plans under RCW 36.70A.040 must adopt a rural element in its comprehensive plan that provides for a variety of rural densities, whether or not the county contains any "significant blocks" of undivided land. RCW 36.70A.070(5)(d). The Court held the Board erred by ruling otherwise.

Under the GMA, a county can account for unique local conditions in drafting the rural element of its comprehensive plan. Although the Board erred in its use of the "significant blocks" test, the Court affirmed the Board's decision finding the rural element in compliance, based on the unique circumstances in Island County. The Board looked at the relatively high population density in the County, the fact that 70% of the County's population lived in the rural area, the relatively small amount of remaining land that could be subdivided to create 5- or 10-acre lots, the relative absence of recent subdivision, the "alternative regulations" the County adopted to protect rural character, and the "decidedly rural density" of 5- and 10-acre zoning.[58] The Court held that this analysis justified the Board's decision.

Evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. The Board concluded that some of the stream buffers adopted to protect fish and wildlife habitat conservation areas were not supported by the scientific information in the record before the County. The Court of Appeals affirmed, rejecting the County's argument that the Board must defer to the local government's discretionary balancing of the best available science (BAS) with other factors. RCW 36.70A.172(1) requires the BAS to be included in the record and considered substantively in the development of critical areas policies and regulations.[59] The Court held the Board's disapproval of the stream buffers was supported by sufficient evidence.

If a city or county adopts a critical areas regulation that is outside the range supported by the best available science, it must provide findings explaining the reasons for its departure from the best available science and identifying the other GMA goals being implemented by that departure. The Court found no such findings or explanation in the record.

A Growth Management Hearings Board is free to choose from among competing scientific evidence in the record in assessing whether the County properly included the best available science. The Court rejected the County's argument that the Board acted arbitrarily and capriciously by rejecting the evidence provided by the County's scientific consultant. The Court explained that the Board did not willfully disregard expert opinion, but simply disagreed with the County as to the content of the BAS in the record. When the Board observes that the majority of scientific information in the record supports a specific conclusion and explains its reasoning, it has not inappropriately relied on a preponderance of the evidence (rather than the clearly erroneous standard required under RCW 36.70A.320(3)).

The GMA requires that critical areas regulations protect <u>all</u> functions and values of the designated areas. The Court affirmed the Board's rejection of the evidence offered by the County's scientific consultant as to some stream buffers because it did not address wildlife species other than fish in recommending buffers to protect fish and wildlife habitat conservation areas.

To the extent a county or city relies on a previously-adopted ordinance to protect critical

[58] 122 Wn. App. at 168-69.

[59] *Id.* at 171, citing *Honesty in Envtl. Analysis & Legis. (HEAL) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999) (discussed above at page 7).

areas, that prior ordinance may be challenged for compliance with the GMA's best available science requirements. The County relied partly on a six-year-old wetlands ordinance to protect fish and wildlife habitat conservation areas. When WEAN sought to challenge that reliance, the County argued the Board exceeded its authority by requiring the wetlands ordinance to comply with the BAS requirement, which was enacted after the wetlands ordinance was adopted.

The Court agreed that the BAS requirement does not operate retroactively, but it explained that critical areas regulations adopted before the BAS requirement was enacted were subject to challenge to the extent the County relied on them to fulfill the obligations imposed by the BAS requirement. "Otherwise, a county could use myriad preexisting regulations in an attempt to satisfy GMA critical areas requirements without actually having to include BAS analysis. This would contravene RCW 36.70A.172."[60]

In this case, the Court found the County did not rely substantively on the earlier wetlands buffers to protect fish and wildlife habitat, and it reversed the Board's invalidation of the wetlands buffers.

An exception from critical areas regulations for agricultural activities must be supported by evidence in the record that such an exception is necessary and that the best available science was employed in crafting the exception. The County exempted from critical areas regulations all existing and on-going agricultural activities using best management practices to minimize impacts to critical areas. The exemption applied to agricultural activities in the rural area, without regard to whether they were on land designated as agricultural land of long-term commercial significance under RCW 36.70A.170. The Court affirmed the Board, holding there was no evidence in the record to support such a broad exemption or to demonstrate that BAS was used in crafting the exception.

[60] *Id.* at 180. The language and holding in this portion of the decision was modified from the previous decision withdrawn by the Court.

Pavlina v. City of Vancouver, 122 Wn. App. 520, 94 P.3d 366 (July 13, 2004).

This case involves the application of GMA impact fees.

Factual and Procedural Background

In 1988, Clark County granted preliminary plat approval that created two lots planned for an office building project (only one of the lots was at issue in this appeal). As a condition of plat approval, the County required that the lot participate in a road improvement district. The County preliminarily approved a site plan, then gave final site approval and issued a determination of nonsignificance (DNS) under SEPA. Because of the DNS, the County did not impose any traffic mitigation measures.

In 1993, the City annexed the site. In 1995, the City adopted an impact fee ordinance under RCW 82.02. In 2002, the City granted final site plan approval and issued building permits. On the day the developer received the building permits, it paid the impact fees under protest, then appealed the impact fees.

The hearing examiner upheld the impact fees, and the Superior Court affirmed.

The Court's Decision

The Court of Appeals began by explaining the impact fees statutes at issue in the appeal.

RCW 82.02.050 was enacted as part of the GMA to ensure that developers pay a proportionate share of costs for using public facilities when they build new developments. It authorizes cities to impose impact fees on those involved in development activities. A "development activity" is "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land, that creates additional demand and need for public facilities." RCW 82.02.090(1). RCW 82.02.090 distinguishes between "project improvements" and "system improvements." "System improvements" are public facilities included in a capital facilities plan that are designed to serve service areas within the community at large. RCW

80.02.090(6). "Project improvements" are site improvements and facilities designed to serve a particular development project and "that are necessary for the use and convenience of the occupants or users of the project, and are not system improvements." RCW 82.02.090(6). A city may impose impact fees under RCW 82.02.050 on "system improvements," but the fees imposed must be reasonably related to the new development, they may not exceed a "proportionate share" of the costs of system improvements reasonably related to the new development, and they must be used for system improvements that will reasonably benefit the new development (they need not be spent on infrastructure that directly benefits the development; they may be used to provide only a general benefit to the entire area).[61]

In *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019 (2000),[62] the Court held impact fees are not conditions of approval because they do not affect physical aspects of development. Accordingly, impact fees may be imposed on new developments. The question in this appeal was whether they could be imposed on a project approved before the impact fee ordinance was adopted. The Court answered yes, explaining that preliminary approval is not final approval. The intent of the Legislature and of the City in this case was to impose fees on new growth and development. ***"Growth and development" occurs when an approved project is under construction, not when it receives preliminary approval. The trigger for imposing impact fees is the building permit application.*** There is no reason to collect impact fees on preliminary approval.

The Court reaffirmed that an impact fee is not a land use ordinance than vests with an application.[63] ***An applicant has no vested right to avoid an impact fee.***

Diehl v. Western Washington Growth Management Hearings Board, 153 Wn.2d 207, 103 P.3d 193 (Dec. 16, 2004).

Factual and Procedural Background

Maons County challenged the sufficiency of Mr. Diehl's service of his petition for judicial review of a Growth Management Hearings Board decision. The Superior Court ruled that RCW 34.05.542 and CR 4 both governed service of the petition and dismissed it. The Court found Mr. Diehl violated CR 4(c) by serving original process himself and violated CR 4(g) by submitting an improper declaration of service, and it ruled these violations of the civil rules deprived it of jurisdiction to hear the appeal.

The Court of Appeals affirmed.

The Court's Decision

The Supreme Court reversed. It began with the familiar rule that the Administrative Procedure Act (APA), RCW 34.05, establishes the exclusive means of judicial review of agency action in most cases. The Legislature intended the civil rules will apply in APA appeals only where specifically authorized. In this context, they apply only if proof of service of a petition for judicial review is an "ancillary procedural matter" under RCW 34.05.510(2) and if they are not inconsistent with the APA.

The Court found it was not necessary to decide whether proof of service is an ancillary procedural matter, since the requirements for proof of service in the civil rules are inconsistent with those in the APA. The APA does not require proof of service in the form of an affidavit, nor does it prohibit a petitioner from serving his own petition. The Court held Mr. Diehl had complied with the APA's service requirements. ***To invoke the Superior Court's appellate jurisdiction, a petitioner must serve the petition on the agency at its principle office,***

[61] 122 Wn. App. at 526 (citing RCW 82.02.050(3); *Wellington River Hollow, LLC v. King Cy.*, 113 Wn. App. 574, 54 P.3d 213 (2002), *review denied*, 149 Wn.2d 1014 (2003)). *Wellington* is discussed above at page 34.

[62] *New Castle* is discussed above at page 13.

[63] 122 Wn. App. at 529 (citing *New Castle*).

serve the other parties of record, and serve the Office of the Attorney General, and must do so within 30 days after service of the final order. Service may be by mail or by personal service. If by mail, service is complete when deposited in the mail, as evidenced by the postmark. Failure to serve the Attorney General is not grounds for dismissal if the record shows the Attorney General has actual knowledge. The Superior Court remanded to the Superior Court for a hearing on the merits.

Biggers v. City of Bainbridge Island, 124 Wn. App. 858, 103 P.3d 244 (Dec. 21, 2004), *review granted*, 156 Wash.2d 1005 (Jan. 11, 2006).

Factual and Procedural Background

In 2001, while preparing a revised Shoreline Master Program (SMP) and Critical Areas Ordinance, the City imposed a moratorium to preserve the status quo. Several businesses and citizens sued to invalidate the moratorium. The Superior Court determined (1) that the moratorium was not a valid amendment to the SMP; (2) that no statute authorized the moratorium; and (3) that it conflicted with state laws in violation of Article XI, Section 11, of the Washington Constitution. The City appealed.

The Court's Decision

The Court of Appeals affirmed, holding the City lacked statutory authority to impose the moratorium. Relevant to the GMA, the Court held ***the moratorium authority in RCW 36.70A.390 applies only to growth management plans and regulations and not to shoreline management policies and controls.***

The Court rejected the City's argument that the GMA applies to shoreline development to the exclusion of the Shoreline Management Act, RCW 90.58: "***The GMA clearly specifies that chapter 90.58 RCW (the SMA) governs the unique criteria for shoreline development. In other words, the SMA trumps the GMA in this area, and the SMA does not provide for moratoria on shoreline use or development.***"[64]

The Supreme Court accepted review and heard oral argument on March 16, 2006.

APPELLATE DECISIONS IN 2005

Quadrant Corp. v. Growth Management Hearings Board, 154 Wn.2d 224, 110 P.3d 1132 (May 5, 2005).

Factual and Procedural Background

Two citizens groups challenged King County's designation of the "Bear Creek island" as an urban growth area in 1994. The Central Board found the designation did not comply with the GMA and remanded to the County with instructions to do one of the following: (1) delete the Bear Creek area from the UGA; (2) make the Bear Creek island a fully-contained community if it met the requirements of RCW 36.70A.350; or (3) adequately justify its inclusion in the UGA under RCW 36.70A.110. The Board ultimately was upheld in *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999).[65] In that case, the Supreme Court remanded to the Board to determine whether King County's redesignation of the Bear Creek island as a fully-contained community complied with the GMA or, alternatively, whether the County had justified the Bear Creek urban designation under RCW 36.70A.110.

On remand, the Board again determined that the Bear Creek island did not meet the statutory requirements for designation as an urban growth area because the property was not "already characterized by urban growth" and not "adjacent to lands characterized by urban growth." The Board decided that the phrase "characterized by urban growth" speaks to the built environment and excludes planned or

[64] 124 Wn. App. at 867.

[65] *See* above at page 6.

permitted development from consideration. The Board concluded the Bear Creek island satisfied the fully-contained community designation the County enacted following the earlier remand.

The Superior Court reversed. The Court of Appeals reinstated the Board's decision.

The Court's Decision

The Washington Supreme Court unanimously affirmed in part and reversed in part. Finding that its holdings resolved the parties dispute, the Court concluded that no remand to the Board was necessary.

The phrase "already characterized by urban growth" in RCW 36.70A.110 includes vested and permitted development as well as existing development. The Supreme Court reversed the Court of Appeals, holding that King County's application of the GMA was not clearly erroneous when it construed the phrase "already characterized by urban growth" to include vested development applications and issued permits, in addition to existing development. The Court concluded that to ignore the likelihood of future development when planning for the future would not further the Legislature's intent in establishing the GMA.

The Court will not defer to a Board decision that failed to use the "clearly erroneous" standard of review. In interpreting RCW 36.70A.110, the Court paid special attention to the 1997 amendments to GMA that changed the Board's standard of review. The Court held that "deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general."[66] In other words, "a board's ruling that fails to apply this 'more deferential standard of review' to a county's action is not entitled to deference from this court."[67] Consistent with previous decisions,[68] however, the Court acknowledged that deference to the county' decisions ends when it is shown that a county's actions are a clearly erroneous application of the GMA.[69]

The only criteria for designating a fully-contained community are those in RCW 36.70A.350. The Supreme Court affirmed the Court of Appeals holding that the County's designation of the Bear Creek Area complied with the requirements in RCW 36.70A.350. The Court rejected arguments that the GMA goals impose specific locational requirements for fully-contained communities apart from the nine criteria listed in RCW 36.70A.350.

James v. County of Kitsap, 154 Wn.2d 574, 115 P.3d 286 (July 7, 2005).

Factual and Procedural Background

In 1977, before the enactment of the GMA, Kitsap County adopted a comprehensive plan that contained an element providing the capital facility improvements necessary to serve new development in the County. In 1991, the County adopted an impact fee ordinance to assist in funding capital facility improvements. In 1994, the County adopted its first comprehensive plan under the GMA. Unfortunately, the County had some difficulties in adopting a compliant comprehensive plan under the GMA, and a fully compliant plan was not achieved until 2000.

Between 1991 and 1995, the County collected impact fees for permits that were consistent with the comprehensive plan then in effect. When the Growth Management Hearings Board invalidated the 1994 comprehensive plan in October 1995, the County stopped collecting impact fees. Rather than imposing a moratorium on development, the County required permit applicants to either (1) sign an agreement promising to pay impact fees in the future when the County had a comprehensive plan fully compliant with the GMA, or (2) pay the impact fee voluntarily. The County did not expend any fees thus paid, holding the fees in separate

[66] 154 Wn.2d at 238, ¶ 23.

[67] Id.

[68] *See Thurston Cy. v. The Cooper Pt. Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002), discussed above at page 35. This holding was reaffirmed in *Lewis Cy. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006), discussed below at page 54.

[69] *Id.*

accounts for the park department and the public works department.

In 1999, certain developers filed a class action to obtain a refund of impact fees paid. The Superior Court rejected the argument that the refund claims were time-barred under LUPA and ordered the County to refund impact fees to the developers.

The Court's Decision

The Washington Supreme Court accepted direct review and reversed.

A principle goal of the GMA is to ensure that public facilities and services necessary to support development are available at the time the development is ready for occupancy. RCW 82.02.050(2) authorizes counties and cities planning under the GMA to impose impact fees to finance public facilities.

The imposition of impact fees under RCW 82.02.050 is a "land use decision" that must be challenged under LUPA. The Court defined the central issue as whether the imposition of impact fees as a condition on the issuance of a building permit is a "land use decision" subject to the procedural requirements of LUPA. The Court rejected the developers' argument that the imposition of impact fees is a revenue decision subject to a three-year statute of limitations, holding instead that the imposition of impact fees as a condition on the issuance of a building permit is a "land use decision" as defined in LUPA, which is not reviewable unless challenged within 21 days as required in RCW 36.70C.040.

The Court also held that impact fees imposed under RCW 82.02.050(2) are development conditions tied to a specific, identified impact of a development on a community, as required in *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 897 (2002),[70] and thus are ministerial decisions subject to judicial review under LUPA.

Four members of the Court dissented,[71] arguing that the 21-day rule in LUPA does not apply to monetary claims.

Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (Aug. 18, 2005).

Factual and Procedural Background

A developer bought a parcel in a neighborhood of single-family residences covered by a restrictive covenant drafted in the 1930s. The covenant contained two racial restrictions and a density restriction. The developer sought to build multifamily housing and sought a release from the covenant's density restriction. When the neighboring homeowners refused the developer's request, the developer sued to invalidate the entire covenant.

The Superior Court invalidated the restrictive covenant, concluding it was unenforceable both because of the illegal racial restrictions and because the density restriction was incompatible with the GMA. The Court also concluded that judicial enforcement of the covenant would violate the developer's substantive due process rights because the developer could not simultaneously comply with the covenant and the applicable zoning regulations.

The Court's Decision

The Supreme Court accepted direct review. All parties agreed the racial restrictions in the covenant were invalid. The two issues before the Court were (1) whether the density restriction could be severed from the invalid racial restrictions, and (2) whether the density restriction must be invalidated because it violated the GMA's urban density and anti-sprawl requirements.

The Court held that the density restriction could be severed from the racial restrictions, then turned to the public policy arguments involving the GMA.

[70] *See* above at page 30.

[71] Justices Sanders, Ireland, Alexander, and Chambers.

Density limitations in a restrictive homeowner's covenant that predates the GMA do not violate public policy reflected in the GMA. The Court described homeowner's covenants as agreements that preserve property values. On that basis, it explained that it would not find that a restrictive covenant conflicts with public policy unless the record demonstrates a clear "legislative intent to declare a general public policy sufficient to override a contractual property right."[72] The Court found that the GMA does not state or imply an intent to override contractual density limitations; rather the GMA was intended to coordinate the state's future growth.

The Court rejected the developer's invitation to "elevate the singular goal of urban density to the detriment of other equally important GMA goals," noting the inherent tension among those goals.[73] Explaining that a restrictive covenant simultaneously may impede some GMA goals and further others, the Court purported to defer to the City's determination as to how the goals should be balanced.[74]

The Growth Management Hearings Boards are not authorized to make regional or statewide "public policy." The developer argued that the density provisions were invalid because they conflicted with the public policy reflected in the Growth Management Hearings Boards' bright line rule defining urban development as requiring at least 4 dwelling units per acre.[75] The court rejected the argument on three grounds.

First, the Court held that the GMA does not impose a "bright line" minimum of four dwellings per acre. If the Boards attempted to erect such a bright line, they would be exceeding their statutory authority. The Boards do not have authority to make regional or statewide "public policy." Rather, they are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute.

Second, noting that the GMA creates a general "framework" to guide local jurisdictions instead of "bright line" rules, the Court concluded that the existence of restrictive density covenants that predate the GMA and limit density within the urban growth areas are the type of "local circumstances" that may be addressed through local discretion.

Third, although the City's zoning regulations call for a minimum density of four dwelling units per acre, the Court found that the regulations did not compel property owners to develop their parcels to any particular minimum density. The Court also found that the City had explicitly accounted for the existence of restrictive covenants in its comprehensive plan by forecasting that areas subject to covenants would experience less future growth than other areas within the City.

The Court also held that the developer's substantive due process rights were not violated since it had not demonstrated that enforcement of the density provisions in the restrictive covenant would be unduly oppressive.

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[72] 155 Wn.2d at 126, ¶ 32 (quoting *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 823, 854 P.2d 1072 (1993)).

[73] *Id.* at 127, ¶ 36.

[74] It may be questioned whether the Court really deferred to the City's balancing of the GMA goals. The City of Shoreline had adopted zoning requiring 4 units per acre, presumably to give effect to its balancing of the GMA goals. The restrictive covenant allowed no more than 2 units per acre. If the Court really were to defer to the City's balancing, then presumably it would have deferred to the zoning decisions made by the City. Instead, the court ultimately held that the City was powerless to enforce or invalidate restrictive covenants.

[75] Viking relied upon a 1995 decision of the Central Puget Sound Growth Management Hearings Board, *Bremerton v. Kitsap Cy.*, CPSGMHB No. 95-3-0039, Final Decision and Order (Oct. 6, 1995). In fact, the Central Board has never said that the GMA imposes a bright line rule. In its *Bremerton* order, and in numerous subsequent orders, the Central Board said only it would assume 4 dwellings per acres or more was "compact urban development" and that it would give "increased scrutiny" to lower densities "to determine if the number, locations, configurations and rationale for such lot sizes complies with the goals and requirements of the Act."

Clallam County v. Western Washington Growth Management Hearings Board, 130 Wn. App. 127, 121 P.3d 764 (Oct. 25, 2005).

Factual and Procedural Background

In two orders, the Board found a portion of an updated critical areas ordinance was noncompliant with the GMA and invalid because it created an exemption from the critical areas ordinance for ongoing, preexisting agricultural uses in critical areas or their buffers. The Board concluded the County could not completely exempt ongoing agricultural uses because those uses significantly impacted the environment.

The Superior Court reversed.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part and remanded to the Board.

The GMA authorizes counties and cities to regulate existing uses in critical areas and their buffers to advance the GMA's goals. The petitioners argued that the GMA requires the County to regulate preexisting agricultural uses in critical areas. The Court compared the language in RCW 36.70A.060(1) (development regulations adopted to assure the conservation of agricultural, forest, and mineral resource lands "may not prohibit uses legally existing on any parcel prior to their adoption") with that in RCW 36.70A.060(2) (which is silent as to whether development regulations adopted to protect critical areas may prohibit prior uses). Based on its review of the legislative history of RCW 36.70A.060, the broad definition of "development regulations" in RCW 36.70A.030, the breadth of the best available science requirement in RCW 36.70A.172(1), and the natural resources goal in RCW 36.70A.020(8), the Court concluded the Legislature intended that counties regulate critical areas, including existing uses, to advance the GMA's goals:

> We conclude that the plain language of chapter 36.70A demonstrates the legislature's intent that GMA counties and cities exercise some measure of control over preexisting uses in critical areas. Reading a broad exemption into critical areas regulation for preexisting uses would frustrate, not further, the legislature's intent.[76]

An agricultural exemption from critical areas may extend to include agricultural uses on rural lands, but any exemption must be balanced with restrictions based on best available science that address any harm to critical areas resulting from the exemption. Acknowledging that <u>some</u> agricultural lands could be exempt from critical areas regulations, the Court reversed the Board's conclusion that only existing uses in designated agricultural resource lands may be exempted from critical areas regulations. Characterizing the Board's conclusion as an "apparent policy," the Court explained that such a policy is contrary to the GMA's emphasis on balancing competing goals, a balance which is to be undertaken by the County, with the Board owing deference to that balancing. The Court held the County could expand its agricultural land exemption to include agricultural uses outside designated agricultural lands, but it must balance the exemption with restrictions based on best available science that address any threatened harm resulting from the expanded exemption.

A petition for review by the Supreme Court is pending.

Lathrop v. State Energy Facility Site Evaluation Council, 130 Wn. App. 147, 121 P.3d 774 (Oct. 27, 2005).

Factual and Procedural Background

The State Energy Facility Site Evaluation Council (EFSEC) is charged with conducting administrative proceedings to evaluate energy facility site applications then forward a recommendation to the Governor. Lathrop intervened in EFSEC proceedings regarding a proposed wind turbine facility in Kittitas

[76] 130 Wn. App. at 137, ¶ 22. One of the three judges dissented from this part of the decision.

County, arguing the proposed siting was inconsistent with the County's land use plans adopted under the GMA. When the facility proponent asked EFSEC to preempt the County's plan, Lathrop filed a petition in Kittitas County Superior Court, challenging EFSEC's preemption authority.

The Superior Court dismissed Lathrop's petition for lack of subject matter jurisdiction.

The Court's Decision

The Court of Appeals affirmed. Dismissal was required, because the statutory authority to review energy facility siting decisions under RCW 89.50.140(1) rests solely with the Thurston County Superior Court after a final decision by the governor.

Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 123 P.3d 102 (Nov. 17, 2005).

Factual and Procedural Background

In 1997, a citizens group filed a petition with the Eastern Board alleging the County had failed to include best available science (BAS) when adopting policies to protect two types of critical areas: wetlands and fish and wildlife habitat conservation areas. The Board agreed and found the County in noncompliance.

After some delay, the County responded by amending its comprehensive plan policies designating fish and wildlife habitat conservation areas. The County chose not to follow the recommendations provided in materials produced by the state Department of Fish and Wildlife, instead relying on the recommendations of a paid consultant. The citizens group alleged the consultant's recommendations were not based on BAS and were inconsistent with other science in the record. Again, the Board agreed and found the County in continued noncompliance.

The Superior Court and Court of Appeals affirmed. The Court of Appeals held the Board's decision was supported by substantial evidence in the record, and it explained how the County's consultant relied on only two sources to determine which species required habitat protection: a guide to breeding birds in Washington and conversations with an unidentified state biologist. The consultant did not conduct any field observations, did not consult with other experts with knowledge of the region, and did not engage in any other "reasoned analysis."

The Court's Decision

The Supreme Court accepted review to decide whether substantial evidence supported the Board's finding that the County did not base its species listing on the best available science.

Compliance with the GMA's best available science requirement must be supported by evidence in the record. Noting the absence of any statutory definition, the Court turned to the Growth Management Hearings Boards' interpretations of the BAS requirement as an indication of the operative standards at the time of Ferry County's actions in this case. The Court concluded the Boards "at least required local governments to produce valid scientific information and consider competing scientific information and other factors through analysis constituting a reasoned process."[77] The Court held that regardless of the precise definition applied, the process undertaken and the information considered by Ferry County in this case did not rise to the level of BAS.

The record must demonstrate that the County used scientific information and analyzed that information using a reasoned process. The Court appears to have used a two-part test to assess the County's compliance with the GMA's BAS requirement: (1) the County must rely on scientific information—the BAS requirement does not mandate the use of a particular methodology, but it requires at a minimum the use of a scientific methodology; (2) the steps taken in analyzing the scientific information must constitute a reasoned process, with the process evident in the record. Quoting from a 2000 Western Board decision, the Court suggested it is not a reasoned process for a county to "choose its own science over all other

[77] 155 Wn.2d at 835, ¶ 21.

science" or "use outdated science to support its choice."[78]

The Court also cited approvingly to the BAS guidance adopted by the state Department of Community, Trade and Economic Development in 1999 (WAC 365-195-900 through -925), which provide criteria for assessing whether proffered information can be considered scientific information and for engaging in a "reasoned process." The rules did not apply to Ferry County's actions here because the rules took effect after those actions.

Two justices dissented.[79]

Woods v. Kittitas County, 130 Wn. App. 573, 123 P.3d 883 (Nov. 29, 2005), *review granted*, 143 P.3d 829 (Oct 10, 2006).

Factual and Procedural Background

Kittitas County adopted an ordinance approving a request by three landowner companies to rezone 252 acres they owned from the forest and range zone (with a 20-acre minimum lot size) to rural-3 (with a 3-acre minimum lot size). Woods filed a LUPA action challenging the rezone. The Superior Court overturned the rezone, concluding it was inconsistent with the GMA because it allowed development "urban in nature" in a rural area.

The Court's Decision

A Superior Court hearing a LUPA petition lacks subject matter jurisdiction over allegations of noncompliance with the GMA.[80] In the Court of Appeals, the decision turned on whether Woods was challenging the validity of the site-specific rezone adopted in the ordinance or the validity of the rural-3 zone itself. If she was challenging only the validity of the site-specific rezone (i.e., its consistency with the comprehensive plan and governing development regulations), she properly filed a LUPA petition in Superior Court. If she was challenging the rural-3 zone for alleged noncompliance with the GMA, only the Growth Management Hearings Board would have jurisdiction and the Superior Court would have lacked subject matter jurisdiction to hear her appeal. The Court of Appeals concluded Woods indeed had brought a LUPA petition and that the Superior Court was without jurisdiction to decide whether the site-specific rezone complied with the GMA.

The Court of Appeals considered, but rejected, Woods' other challenges to the rezone, holding that the record supported the County's determinations that the rezone (1) complied with the comprehensive plan requirements for rural areas, (2) bore a substantial relationship to public health, safety and welfare, and (3) was appropriate based on the surrounding zoning and development; and concluding the subject property was suitable for development under the rural-3 standards.

The Supreme Court accepted review to determine whether the Superior Court had jurisdiction to consider a LUPA petition alleging a rezone did not comply with the urban growth restrictions of the GMA.

Chevron U.S.A., Inc. v. Central Puget Sound Growth Management Hearings Board, 156 Wn.2d 131, 124 P.3d 640 (Dec. 15, 2005).

Factual and Procedural Background

This appeal arose from an annexation dispute between the City of Shoreline and the Town of Woodway over Point Wells, which is owned by Chevron U.S.A. The Central Board found Woodway's comprehensive plan to be inconsistent with Shoreline's comprehensive plan because each plan designated the same area of unincorporated land as a "potential annexation area."

[78] *Id.* at 837-38, ¶ 28.

[79] Justices J. Johnson and Sanders.

[80] *But see Moore v. Whitman County*, 143 Wn.2d 96, 18 P.3d 566 (2001) (suggesting that a LUPA petition is an appropriate means of challenging alleged noncompliance with the GMA in those counties and cities not planning under RCW 36.70A.040).

Woodway had published notices of Town Council hearings related to the comprehensive plan amendments, but did not provide personal notice to Chevron. Chevron contended the GMA's public participation provisions required personal notice. Having found the inconsistency between the two comprehensive plans to be noncompliant with the GMA, the Board did not address Chevron's contention.

Woodway obtained review in Snohomish County Superior Court, contending the Board erred in finding an inconsistency between the two comprehensive plans. The Superior Court reversed, and Shoreline appealed.

Chevron obtained review in King County Superior Court, contending the Board erred by failing to resolve whether Woodway gave adequate notice of its proposed 2001 comprehensive plan amendments to Chevron. The Superior Court denied review on that issue, and Chevron appealed.

The Court of Appeals' Decision

The Court of Appeals consolidated the two appeals. Turning first to Shoreline's appeal, the Court applied the Board's definition of consistency—that the provisions are compatible with each other and one provision does not thwart the other—and found no inconsistency between the two comprehensive plans. ***"There is no logical reason to conclude that two municipalities may not identify the same area of land for potential annexation simply because one or the other already has done so."***[81]

Turning to Chevron's appeal, the Court assumed, without deciding, that the Board should have addressed the notice issue. The Court affirmed the Board, however, because Chevron suffered no prejudice as a result of the Board's action.

The Supreme Court's Decision

The Supreme Court granted review solely to consider the notice issue raised by Chevron.

Neither the GMA nor due process requires individualized notice to a specific landowner of a hearing related to a comprehensive plan amendment. Chevron conceded Woodway's notice complied with the GMA's statutory requirements, and argued instead that due process required individual notice of proposed comprehensive plan amendments affecting Chevron's property. In a unanimous decision, the Court rejected Chevron's due process claim. Citing cases requiring individual notice because the owner's land was "uniquely targeted by the government" such that the owner's "property rights are actually and significantly affected," the Court held Chevron's rights were not affected because Woodway could not annex the property without Chevron's consent.

APPELLATE DECISIONS IN 2006

City of Olympia v. Drebick, 156 Wn.2d 289, 126 P.3d 802 (Jan. 19, 2006), *cert. denied*, 127 S. Ct. 436 (Oct. 16, 2006).

Factual and Procedural Background

Chapter 82.02 RCW, which authorizes local governments to levy impact fees on new development, was amended as part of the GMA. Mr. Drebick challenged a traffic impact fee levied on a new office building, alleging it violated RCW 82.02.050(3), which limits impact fees to no more than a "proportionate share" of system improvements that are "reasonably related to the new development." The City calculated the fee by averaging the cumulative traffic-related impacts of all new office buildings. A hearing examiner held that the fee could not exceed the individualized impacts of the specific building. The Superior Court reversed.

Agreeing with the hearing examiner, the Court of Appeals construed RCW 82.02.050(3) to mean that impact fees must be reasonably related to the individualized effects of the particular project. The Court did not address

[81] 123 Wn. App. at 168.

whether a city can perform the necessary assessment legislatively, by enacting an ordinance with narrow enough categories, or whether a city must perform the necessary assessment quasi-judicially.

The Court's Decision

Impact fees must be proportionate, reasonably related, and beneficial to the individualized effects of a particular project on the service area as a whole. The Supreme Court reversed, holding that the City's method of calculating impact fees complied with the statute. Under RCW 82.02.050 impact fees must be proportionate, reasonably related, and beneficial to the specific development on which they are imposed, but the statute authorizes local governments to calculate the fees by tying the particular development to the service area's improvements as a whole, not just to particular system improvements within the service area. In this case, the service area included the City's entire urban growth area, but the reasonableness of that designation was not before the Court.

Three justices dissented.[82]

Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 129 P.3d 300 (Feb. 28, 2006), *amended on reconsideration* (May 23, 2006.

Factual and Procedural Background

Thurston County denied Cingular's application for a wireless communications facility (WCF) special use permit in a rural residential area. The County Code contained specific standards for WCFs, as well as general special use standards including compliance with the comprehensive plan and the purpose of the zoning district and being appropriate in the proposed location. The County concluded that the proposed WCF met the specific standards but did not comply with the general standards because it was not compatible with the area and would adversely affect neighborhood character.

The Superior Court affirmed.

[82] Justices Sanders, J. Johnson, and Chambers.

The Court's Decision

A county may rely on general standards in its comprehensive plan where those standards are consistent with more specific standards in the development regulations and where the development regulations require consistency with those general standards. On appeal, Cingular argued that the County could not use general standards in the comprehensive plan to deny a project that met the specific standards in the county code. The Court of Appeals rejected the argument. The Court agreed that specific zoning regulations control over general comprehensive plan provisions where there is a conflict, but it found there was no inconsistency between the general and specific standards here. Moreover, the code expressly included the requirement that WCFs be consistent with the general standards in the comprehensive plan.

The Court also rejected Cingular's argument that the general standards were unconstitutionally vague, holding that the constitution permits general standards, and that the County's standards were sufficiently precise to pass constitutional muster.

Finally, the Court held that the County decision did not violate the Federal Telecommunications Act and that the decision was properly based on substantial evidence of specific adverse impacts and not on generalized community opposition.

Washington Shell Fish, Inc. v. Pierce Cy., 132 Wn. App. 239, 131 P.3d 326 (Mar. 28, 2006).

Factual and Procedural Background

Washington Shell Fish leased shorelands from private parties and the County for geoduck aquaculture. Although some aquaculture was to occur in eelgrass beds, the company neither sought not obtained the necessary permits and authorizations before beginning its activities.

In response to numerous complaints about the company's harvesting and aquaculture activities, the County issued a series of cease and desist orders to the company, under two

sections of the Pierce County Code, one adopted under the Shoreline Management Act, the other adopted under the Growth Management Act.

The hearing examiner and the Superior Court upheld the cease and desist orders.

The Court's Decision

The Court of Appeals affirmed under both provisions of the County Code, interpreting each provision to have independent effect. ***Critical areas regulations adopted under the GMA and a shoreline master program adopted under the SMA may be independently enforced against an activity regulated by both.***

Peste v. Mason County, 133 Wn. App. 456, 136 P.3d 140 (June 14, 2006).

Factual and Procedural Background

Mason County adopted its comprehensive plan and development regulations in 1996 but did not achieve full compliance with the GMA until 2003. Provisions regarding rural areas were found in compliance in 2001, and they downzoned Mr. Peste's rural property. He applied for a rezone back to the former zoning. The County held hearings and denied the application.

The Superior Court affirmed.

The Court's Decision

The Court of Appeals rejected Peste's claim that the County did not comply with the GMA's public participation requirements when adopting the comprehensive plan and development regulations. ***A challenge alleging noncompliance with the GMA must be made to the Growth Management Hearings Board and cannot be raised in a LUPA petition to the Superior Court.***

Peste also claimed a taking and a violation of substantive due process. The Court held the takings claim failed for lack of evidence, and the substantive due process claim failed because the downzone was not unduly oppressive.

Preserve Our Islands v. Shoreline Hearings Board, 133 Wn. App. 503, 137 P.3d 31 (June 19, 2006).

Factual and Procedural Background

Glacier Northwest applied to King County for a shoreline exemption to repair a barge-loading facility to resume barging gravel from its mine on Maury Island. The SEPA analysis concluded the project would result in significant adverse environmental impacts and recommended a number of mitigation measures. When the exemption application was denied, Glacier submitted applications for substantial shoreline development and shoreline conditional use permits. After six years of additional environmental analysis and modifications to its proposal to respond to the County's concerns, the County concluded the barge loading facility was not a water-dependent use under the Shoreline Management Act (SMA) and was inconsistent with the Shoreline Master Program.

The Shoreline Hearings Board reversed and ordered the County to issue a substantial shoreline development permit with conditions.

The Court's Decision

The Court of Appeals accepted direct review.

One issue under the County's Shoreline Master Program was whether the barge loading facility was a water-dependent use. The parties agreed that the principle use was a mining operation. To determine whether the barge loading facility was a water-dependent use, the Court asked whether the facility (1) merely provided an economic advantage to the mine, in which case it would not be a water-dependent use unless the mining operation was water-related; or (2) was an integral part of the mine because the mine could not function commercially without it. To make this determination, the Court examined how the site's land use designation under the GMA and the County's comprehensive plan meshed with the SMA and the Shoreline Master Program.

A Shoreline Master Program adopted under the Shoreline Management Act must be read together with that jurisdiction's comprehensive plan and development regulations adopted under the GMA. Although the Shoreline Master Program designated the site of the barge loading facility as a "conservancy environment," the comprehensive plan designated the site as mineral resource lands, and it was zoned accordingly, with no restrictions on the intensity of the mining operation. The Court found that under the GMA, the comprehensive plan, and the zoning code, the property's intended use controlled, not its past use.

The challengers argued that the SMA and the Shoreline Master Program take priority over the GMA, and nothing in the SMA or Master Program allows commercial viability to determine the principal use. The Court of Appeals disagreed, and it took the opportunity to disagree explicitly with the holding in *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 103 P.3d 244 (2004), *review granted*, 156 Wn.2d 1005 (2006)[83]:

> Division Two held that RCW 36.70A.480, a provision of the GMA which applies to the SMA, dictates that the SMA policies and regulations take priority over those adopted under the GMA, provided the provisions are internally consistent with the statutes enumerated in RCW 36.70A.480(3). . . . We respectfully disagree. RCW 36.70A.480 does not say that, and in fact it requires that regulations implementing the two statutes be harmonized in the process of overall land use planning and regulation.[84]

Citing RCW 36.70A.480, which specifically states that a county's shoreline master program goals and policies are part of that county's GMA comprehensive plan, and the County's shoreline master program regulations are development regulations, and RCW 36.70A.040(4)(d), which states that development regulations must be consistent with and implement the comprehensive plan, the Court held that allowing inconsistency "would create chaos in attempts to implement and apply the numerous, varied and sometimes competing policies and regulations governing the use of land."[85]

A local government may not interpret its Shoreline Master Program to create conflicts with its comprehensive plan or development regulations (or vice versa, presumably). Reading the County's shoreline provisions and GMA provisions together, the Court held the site's principle use is as a commercially significant mining operation under the GMA, comprehensive plan, and zoning code. Because the site is on a small island, the barge-loading facility is an integral part of the principal use. Consistent with the current Shoreline Guidelines, the principal use consists of the integrated mine and barge-loading facility. The Court warned that if the County wants to prohibit commercially significant mining as the principal use, it must do so directly through a zoning change, not by interpreting its Shoreline Master Program to create conflicts, in violation of RCW 36.70A.480(3) and .040(4).

A petition for review has been filed with the Supreme Court. Among the issues presented are (1) whether the Shoreline Hearings Board is required to grant deference to a county's interpretation of its own GMA land use designations and zoning, and (2) whether whether the SMA and Shoreline Master Program should take priority over GMA policies and regulations.

Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 488, 139 P.3d 1096 (Aug. 10, 2006).

Factual and Procedural Background

Lewis County designated agricultural lands of long-term commercial significance based on its assessment of the needs of the local agricultural industry, rather than on the

[83] *Biggers* is discussed above at page 44.

[84] 133 Wn. App. at 523, ¶ 29 (footnote omitted).

[85] *Id.* at 524, ¶ 31.

characteristics of agricultural lands. The County relied on the language of the GMA's natural resources goal, RCW 36.70A.020(8), for its designation criteria.

The record showed 283,000 acres of prime agricultural soils in the County, 117,000 acres of which was in active agricultural use, but the County designated only 13,767 acres of Class A farmland, with another 40,000 acres of Class B farmland designated because of its location in the flood zone.

Relying substantially on *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), the Board concluded the Legislature intended that the designation of agricultural lands be based on the characteristics of the land, including the factors listed in RCW 36.70A.030(2) and (10), rather than on shifting economic conditions, because once those lands are converted to other uses, their capacity to produce food is likely gone forever.

The Superior Court affirmed.

The Court's Decision

The Supreme Court accepted direct review.

The Court held that both the Board and the County incorrectly defined "agricultural land." ***Under the GMA, agricultural land to be designated and conserved under RCW 36.70A.060 and .170 is land that (1) is not already characterized by urban growth; (2) is primarily devoted to the commercial production of agricultural products, including lands capable of such production based on land characteristics; and (3) has long-term commercial significance for agricultural capacity based both on soil characteristics and development-related factors.*** Starting with the premise that looking strictly to the physical nature of the land would stifle economic development in counties that have a "significant amount of potentially good farmland, much of which is unproductive,"[86] the Court explained that the statutory definition of agricultural land in RCW 36.70A.030(2) has two parts: agricultural lands are those which (1) are "primarily devoted to" commercial agricultural production, and (2) have "long-term commercial significance" for such production.

The Court distinguished the focus on soils in *City of Redmond v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), as having dealt only with the first part of the statutory definition. Addressing "long-term commercial significance," the Court cited approvingly to *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998), *review denied*, 137 Wn.2d 1018, 984 P.2d 1033 (1999), a case that relied on WAC 365-190-050 in dealing with forest lands under the GMA. Although the Supreme Court did not fully explain its approval of *Manke*, it appears the Court approved of the fact that WAC 365-190-050 addresses both soil characteristics and development-related considerations as factors to be used in determining whether agricultural land is of long-term commercial significance.

The Court also rejected the argument that soil characteristics have primacy over development-related considerations, explaining that "counties must do more than simply catalogue lands that are physically suited to farming."[87] They must consider development prospects in determining "if land has the enduring commercial quality needed to fit the agricultural land definition."[88] The Court summarized its holding as follows:

> [B]ased on the plain language of the GMA and its interpretation in [Redmond], we hold that agricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or

[86] 157 Wn.2d at 499, ¶ 11.

[87] *Id.* at 500-01, ¶ 15.

[88] *Id.* at 501, ¶ 15.

> vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance.[89] [¶17]

The Court also held that ***the GMA does not prohibit a county from giving greater weight to the needs of the agricultural industry than to other considerations.*** The GMA does not dictate how much weight to assign each factor in determining which farmlands have long-term commercial significance:

> If the farm industry cannot use land for agricultural production due to economic, irrigation or other constraints, the possibility of more intense uses of the land is heightened. RCW 36.70A.030(10) permits such considerations in designating agricultural lands.[90] [¶18]

The Court remanded to the Board to apply the correct definition of agricultural land in determining whether Lewis County's 2003 ordinances complied with RCW 36.70A.170(1).

A county may allow non-farm uses on designated agricultural lands under RCW 36.70A.177, but only if those uses are designed to conserve agricultural lands and encourage the agricultural economy. The Court affirmed the Board's invalidation of the County's blanket five-acre exemption from agricultural designation to allow non-farming uses on agricultural land. While the GMA "is not intended to trap anyone in economic failure, as evidenced by the mandate to conserve only those farmlands with long-term commercial significance," the Court held it was clear error to exclude from designated agricultural lands up to five acres on <u>every</u> farm, without regard to soil, productivity or other specified factors.[91]

In reaching its decision, the Court clarified its recent holdings regarding deference and the authority of the Boards. ***While the Growth Management Hearings Boards must grant deference to counties and cities in how they plan for growth, consistent with the goals and requirements of the GMA, the Boards are entitled to deference in determining what the GMA requires.*** The Court reaffirmed that the Boards are charged with determining whether a county or city is in compliance with the GMA, explaining that "the Board is more than a deskbook dayminder telling counties what decisions are due."[92] The Court gives substantial weight to the Board's interpretation of the GMA.[93]

Alexanderson v. Board of Clark County Commissioners, 135 Wn. App. 541, 144 P.3d 1219 (Oct. 17, 2006).

Factual and Procedural Background

The Cowlitz Indian Tribe applied for federal trust status for a large parcel it acquired to use for commercial gaming purposes. Because trust land is not subject to the plans and regulations adopted under the GMA, and because the intended use would violate Clark County's adopted comprehensive plan and development regulations, the County entered into a Memorandum of Understanding (MOU) with the Tribe, under which the Tribe would mitigate the impacts of its development, pay development fees, be consistent with the County's building and design standards, and compensate the County for public services on the trust land. In exchange, the County would provide services, including water, to the trust land. The MOU will take effect only when trust status is granted by the federal Bureau of Indian Affairs.

Neighboring landowners challenged the MOU in a petition to the Western Board. The Board dismissed for lack of subject matter jurisdiction, concluding the MOU was not a development regulation, comprehensive plan, or an amendment to either.

[89] *Id.* at 502, ¶ 17.

[90] *Id.* at 503, ¶ 18.

[91] *Id.* at 505, ¶ 20.

[92] *Id.* at 498, ¶ 8, n.7.

[93] *Id.* at 498, ¶ 8 (citing *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000), discussed above at page 19).

The Superior Court affirmed.

The Court's Decision

The Growth Management Hearings Boards have jurisdiction to review an agreement entered into by a city or county which has the effect of amending its comprehensive plan or development regulation. The Court of Appeals held the MOU acted as a de facto amendment to the County's comprehensive plan, and that the Board had jurisdiction to hear the petition challenging it.

1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 149 P.3d 616 (Dec. 21, 2006).

Factual and Procedural Background

In October 2004, the King County Council adopted three ordinances to protect critical areas in unincorporated King County. Ordinance 15051 specifically amended the critical areas protections in the zoning code. Ordinance 15052 amended the surface water regulations to address impervious surfaces, erosion, and runoff. Ordinance 15053 amended the clearing and grading regulations to integrate them with the critical areas amendments adopted in Ordinance 15051. The three ordinances comprised nearly 400 double-spaced pages.

Mr. McFarland filed three proposed referenda, one on each ordinance. King County and others filed an action for declaratory relief, alleging the ordinances were not subject to local referenda because they were adopted pursuant to the GMA. The Superior Court granted the County's motion for summary judgment and held the three ordinances were not subject to local referendum authority, relying primarily on *Whatcom Cy. v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (1994).[94]

[94] In *Brisbane*, a citizen launched a referendum campaign to eliminate portions of the critical areas regulations adopted by Whatcom County to comply with the GMA. The Court rejected the challenge and held that that local referendum rights did not exist because the Legislature had delegated the power to adopt critical areas regulations to the County's legislative body.

The Supreme Court accepted direct review

The Court's Decision

The core issue in the appeal was whether local development regulations adopted to protect critical areas, as required in the GMA, are subject to local referendum authority. The Court in *Brisbane* had held that critical areas ordinances are not subject to local referenda, and McFarland sought to have *Brisbane* overturned.

Critical areas regulations adopted to comply with the GMA are not subject to local referenda. Seven justices voted to affirm the Superior Court. In an opinion signed by four justices, the Court held that under the Washington Constitution, local political subdivisions like counties are subject to the sovereignty of the people of the *State*, acting through the Legislature. When the Legislature requires action from a local legislative body or executive body, that required action is not subject to a veto via local referendum.

The Court explained that when the Legislature instructs a local governmental body to implement state policy, the power and duty is vested in the legislative or executive entity, not the municipality as a "corporate" entity. The Court described the GMA as a "clear example of legislation that creates public policy to be implemented in large part at the local level," and cited *Brisbane* and *Snohomish Cy. v. Anderson*, 123 Wn.2d 151, 868 Wn.2d 116 (1994), for its conclusion that the GMA grants power to local legislative bodies, not to counties and cities in their corporate capacities. The Court concluded *Brisbane* was correctly decided and held legislative intent should be determined based on the entire legislative scheme, rather than on the presence or absence of a specific phrase in a specific section of a statute.

The Court also noted the GMA's requirement for extensive public participation in the GMA planning process and King County's compliance with that requirement: "Requiring so much public input into the development of the regulations and the comprehensive plans is itself evidence that the legislature intended to

leave the ultimate power in the hands of the [local] legislative body."[95]

A local land use ordinance that is adopted to implement the GMA's purposes and requirements and that is reasonably necessary to fulfill the GMA's update requirement is not subject to a local referendum. The Court applied the rule in *Brisbane* to the King County ordinances at issue. All parties agreed the critical areas ordinance was not subject to referendum if the Court upheld *Brisbane*, so the Court focused on Ordinances 15052 (surface water) and 15053 (clearing and grading). To avoid removing all land use regulation from local referendum, the Court held that an ordinance "must implement state policy at the direction of the State to be immune from local referenda." A person opposing a local referendum has the burden of showing the challenged ordinance "is necessary to or was passed for the purpose of implementing state policies"; however, where local legislative intent is clear, the referendum proponent must show, "by evidence and argument, that in fact the ordinance is outside the scope of the state statutory schema." The Court found the County had established that Ordinances 15052 and 15053 were adopted to implement the GMA's purposes and requirements and were reasonably necessary to fulfill the GMA's update requirement, and held they are not subject to local referenda.

Three justices concurred in the result.

[95] 149 P.3d at 626, ¶ 32.